(1)

No. 90-98

In the Supreme Court
OF THE
United States

October Term, 1989

George Franklin, *et al.*,
Petitioners,
vs.

Peat Marwick Main & Co., et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a case brought under Section 11 of the Securities Act of 1933, a good faith settlement with some but not all defendants reduces the potential liability of the remaining defendants by the amount of the settlement, or by the "proportional culpability" of the settling defendants as determined at trial?

2. Whether there is an implied right to contribution available to a defendant sued under Section 10(b) of the Securities Exchange Act of 1934 and/or Section 12 of the Securities Act of 1933?

3. Whether, in a case brought under Section 10(b) of the Securities Exchange Act of 1934 or Section 12 of the Securities Act of 1933, a good faith settlement with some but not all defendants reduces the potential liability of the remaining defendants by the amount of the settlement, or by the "proportional culpability" of the settling defendants as determined after a trial?

PARTIES

Plaintiffs and appellees before the United States Court of Appeals were the petitioners herein, George Franklin, Jon Quint, Ellen Quint, Stefan Reznik, William B. Weinberger, Richard Lowe, Paul L. Holmes and Evelyn S. Holmes, on behalf of themselves and a certified class including all persons other than defendants who purchased Kaypro Corporation stock during the class period. Nonsettling defendants and appellants before the Ninth Circuit were the respondents herein, Peat Marwick Main & Co. and Prudential-Bache Securities. The other parties below, who are presumably not affected by this petition, are the settling defendants, Kaypro Corp., Andrew F. Kay, David A. Kay, Allan M. Kay, Mary M. Kay, Arthur B. Laffer, Bradford W. Ryland, Ludwig Weindling and Roger Woolley.

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The petitioners, George Franklin, Jon Quint, Ellen Quint, Stefan Reznik, William B. Weinberger, Richard Lowe, Paul L. Holmes and Evelyn S. Holmes, on behalf of themselves and a certified class including all others similarly situated, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding and reported at 884 F.2d 1222 (9th Cir. 1989).

OPINIONS BELOW

In the United States District Court for the Southern District of California, the Honorable Leland C. Nielsen, presiding: *In re Kaypro Corp. Shareholder Litigation,* No. 84-2091 N(M) (S.D. Cal. Feb. 1, 1988) [reprinted at Appendices B, C].

In the United States Court of Appeals for the Ninth Circuit, the Honorable Judges Farris, Beezer and Ferguson, presiding: *Franklin v. Kaypro Corp.,* 884 F.2d 1222 (9th Cir. 1989) [reprinted at Appendix A], *petition for rehearing and suggestion for rehearing en banc denied,* April 10, 1990 [reprinted at Appendix E].

JURISDICTION

After the Ninth Circuit issued its decision on September 6, 1989, plaintiffs timely petitioned for rehearing and suggested rehearing *en banc* on September 20, 1989, which petition for rehearing was denied on April 10, 1990, so that this petition for *certiorari* is timely filed by July 9, 1990. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Securities Act of 1933 Sections 11(a),(f), 15 U.S.C. § 77k(a),(f):

> (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue —

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may

be established without proof of the reading of the registration statement by such person.

* * *

(f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

Securities Act of 1933 Section 12, 15 U.S.C. § 77l:

Any person who —

(1) offers or sells a security in violation of [section 5], or

(2) offers or sells a security (whether or not exempted by the provisions of [section 3], other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Securities Exchange Act of 1934 Section 10(b), 15 U.S.C. § 78j(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in

order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

I.

STATEMENT OF THE CASE

A. Introduction

This case presents important questions arising under the federal securities laws, which have created Circuit splits, and which in combination threaten to discourage partial settlements in all multi-defendant federal securities cases.

Plaintiffs who establish liability for violations of the federal securities laws are entitled to a judgment affixing joint and several liability upon the defendants[1] However, in this case the Ninth Circuit held that the right to contribution under Section 11 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77k, supersedes that Section's provision for joint and several liability, so that a plaintiff who enters a partial settlement with some of the defendants loses his right to enforce joint and several liability against the rest, even after deducting the amount of the settlement. The court's holding that *plaintiffs who settle on reasonable terms lose the right to be made whole* is based on the novel doctrine that the plaintiffs' right to joint and several liability is subservient to considerations of "equity between wrongdoers" who injured the plaintiffs. App. at 19a-20a. The Ninth Circuit's holding thus abrogates Congressionally mandated joint and several liability and, as a consequence, discourages settlements and forces parties who would settle to litigate against their will. The court's holding is contrary to the majority rule under state law, to the bulk of federal law outside the

[1] *E.g.*, 15 U.S.C. §§ 77k(f); 77(o); 78t(a).

Ninth Circuit[2], and to the law of California which governs the pendent claims embraced within the same settlement[3].

The opinion below fails to recognize that Congress has mandated joint and several liability in securities cases for the benefit of innocent victims, and that some defendants, including those who may be said to be most culpable, may not have assets (or insurance coverage) with which to satisfy a judgment. By imposing joint and several liability, in Section 11(f) of the 1933 Act and elsewhere, Congress determined that the culpable and solvent parties, rather than the injured parties, should bear the risk that some joint tortfeasors will lack the means to satisfy the judgment. That is, a well-to-do defendant found liable may have the entire judgment collected from him, and his right to contribution under Section 11(f) may be worthless if his joint tortfeasors are insolvent. Under the Court of Appeals' ruling, that risk is shifted to plaintiffs if they wish to enter settlements with any defendant of limited means.

The second issue upon which the Ninth Circuit is in conflict with other Circuits (and has ignored the force of this Court's most pertinent precedents) is its holding that a right to contribution under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") may be implied by judicial fiat. This ruling was made without engaging in the analysis mandated by this Court's precedents in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines, Inc. v. Transport Workers*

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[2]The Ninth Circuit expressly rejects the Second Circuit precedent of *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), *cert. denied*, ____ U.S. ____, 110 S. Ct. 729 (1990). *See* App. 17a-19a, 21a-22a.

[3]*See Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, 38 Cal.3d 488 (1985).

Union, 451 U.S. 77 (1981), and consequently is in conflict with several circuit and district court precedents which apply *Texas Industries* and *Northwest Airlines* and which accordingly hold that no right to contribution may be implied under sections of the federal securities laws that do not explicitly provide for contribution.

In addition, the Ninth Circuit's opinion, although ambiguous, may fairly be read to extend its abrogation of joint and several liability under Section 11 also to Section 10(b) of the 1934 Act and Section 12 of the 1933 Act. Such a holding combines the two vices described above.

Because the Ninth Circuit's holding splits the circuits on these very important issues, because it abrogates joint and several liability, because it finds an implied right to contribution in contravention of this Court's holdings and because it discourages settlement, *certiorari* should issue so that this Court may properly and uniformly resolve the underlying legal principles applicable to cases brought under the anti-fraud provisions of the federal securities laws.

B. Factual Background

Petitioners represent a class of persons who purchased Kaypro Corp. ("Kaypro") common stock at prices which they alleged to be fraudulently inflated. They brought a class action against Kaypro, several of its top officers and directors, and the two respondents herein: Kaypro's investment banker and the lead underwriter for Kaypro's initial public stock offering, Prudential-Bache Securities ("Bache"), and Kaypro's certified public accountants and auditors, Peat Marwick Main & Co. ("Peat Marwick"). The suit charges violations of state and federal law, asserting claims pursuant to Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), Sections 11 and 12 of the 1933 Act, 15 U.S.C. §§ 77k and 77l, and pendent state-law

claims for fraud and deceit and for violation of the California Corporations Code Sections 25400 and 25401[4].

After discovery and certification of the plaintiff class, settlement negotiations ensued between plaintiffs, on the one hand, and Kaypro and its officers and directors on the other. Bache and Peat Marwick were invited to join the settlement discussions, but refused.

Kaypro was on its way to bankruptcy (which occurred subsequent to the settlement at issue here), and its officers and directors did not have sufficient personal wealth to contribute significantly to a judgment in a case of this nature, involving claimed damages of over $25 million. However, Kaypro's officers and directors were covered by a liability insurance policy in the amount of $20 million. The policy not only had arguably applicable exclusions, but also was a "wasting asset" policy, so that any defense costs reduced the amount of insurance potentially available — meaning that the ability of these defendants to contribute to a settlement would be reduced over time by the exhaustive litigation, and potentially a jury trial, in a complex case of this nature. For these reasons, after extensive arm's length negotiations, plaintiffs, Kaypro, and the officers and directors agreed that it was in their mutual self-interest to settle the claims for $9.25 million.

Of course, the settling defendants and their insurers would not pay $9.25 million unless they thereby "bought peace," extricating themselves fully from potential liability in the case. To expend a substantial portion of their insurance coverage to settle plaintiffs' claims, only to face

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[4]The district court had jurisdiction over this case pursuant to 15 U.S.C. §§ 77v, 78aa and 28 U.S.C. §1331. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291, and Rule 54(b), Fed. R. Civ. P.

exposure to Peat Marwick and Bache on cross-claims for contribution under Section 11 would have accomplished nothing. The settling defendants thus demanded protection from cross-claims for contribution as a condition of settlement.

The settling parties sought to obtain this protection from contribution claims of the non-settling defendants by requesting an order from the district court that the settlement was in good faith, that it barred claims for contribution against the settling defendants, and that the $9.25 million would be a set-off against any judgment obtained after trial of the nonsettling defendants. District court authority within the Ninth Circuit at the time permitted such an order on the federal securities claims,[5] and California statutory law explicitly sanctioned such a ruling on the pendent claims arising under state law.[6]

C. The Opinions Below

1. The District Court

The district court approved all aspects of the partial settlement. After a hearing before the magistrate, and after a *de novo* review and further hearing before the district court demanded by Bache and Peat Marwick, the court, over strenuous objections from Bache and Peat Marwick, found the settlement to be in good faith and entered an order cutting off claims of contribution against

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[5] *In re Washington Public Power Supply System Securities Litigation*, 720 F. Supp. 1379, 1398 (D. Ariz. 1989); *In re Washington Public Power Supply System Securities Litigation*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,326, at 92,144 (W.D. Wash. 1988); *Kirkorian v. Borelli*, 695 F. Supp. 446, 452 (N.D. Cal. 1988); *In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987).

[6] California Code of Civil Procedure Sections 877, 877.6 (West 1980 & Supp. 1990).

the settling defendants. The court reviewed liability-related facts, damage analyses, insurance coverage, and other matters, and concluded that the settlement

> is within the reasonable range of the Settling Defendants' proportional share of liability for the Settling Plaintiffs' alleged injuries and reflects the proper and fair share of the Settling Plaintiffs' alleged damages, with due recognition being given to the risks of continued litigation against the Settling Defendants, the difficulties associated with satisfaction of any judgment against the Settling Defendants, the risk of dissipation or loss of assets of the Settling Defendants, including any applicable insurance coverage, and the fact that the Settling Defendants should pay less in settlement than if they were found liable after trial.

App. at 32a. The court further held that "[t]here is no evidence of collusion, fraud or tortious conduct in entering the Stipulation by any of the parties to the Stipulation aimed at causing injury to the interests of the Non-Settling Defendants." *Id.* at 32a. The court applied principles derived from the law of California, and adopted by several district courts within the Ninth Circuit, *see* n.5, *supra,* to hold that the settlement was fair to all parties, entered in good faith, and therefore operated as a bar to claims for contribution and a $9.25 million offset against any judgment. App. 33a.

2. The Court Of Appeals

The non-settling defendants, Bache and Peat Marwick, appealed on the ground that a settlement could not bar contribution claims under federal securities law. Bache and Peat Marwick also contended that, contrary to the district court's finding of fact, the settlement was not entered in good faith. Finally, Bache argued that it had a

right to recover from a settling defendant pursuant to a contractual indemnity clause.[7]

As a preliminary matter, the Court of Appeals rejected the assertion by Bache and Peat Marwick that district courts lack power to bar contribution claims, App. at 15a-17a, noting that "the non-settling defendants' simplistic approach would preclude partial pretrial settlement." *Id.* at 16a. Thus the court acknowledged that, without an effective method of cutting off cross-claims, defendants would never settle such cases.

Having rejected Bache and Peat Marwick's principal argument that contribution bar orders were forbidden, the Court of Appeals affirmed the district court's holding that the settlement was fair and entered in good faith. However, the Court of Appeals determined to tinker with the result below, focusing its efforts upon an issue hardly addressed by the briefs — the amount of the offset to which Bache and Peat Marwick would be entitled at trial because of the $9.25 million settlement.

In addressing this issue, the court determined that it was required to create federal common law. Moreover, although plaintiffs' federal claims were based on Section 10(b) of the 1934 Act, and Sections 11 and 12 of the 1933 Act, the Ninth Circuit's analysis of this issue focused exclusively on Section 11(f)'s explicit provision for contribution among defendants,[8] which has no parallel in Section 12 or Section 10(b).

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[7]The law is clear that indemnification is not permitted under the federal securities laws, *see King v. Gibbs*, 876 F.2d 1275, 1278-83 (7th Cir. 1989), *and cases cited therein, id.* at 1282-83; App. at 23a.

[8]Section 11(f) provides:

> (f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this

The Court of Appeals identified two possible offset rules — the "pro tanto" rule followed by most courts and adopted by the Second Circuit in *Singer,*[9] under which the offset against total damages would be $9.25 million, and the "proportional culpability" rule adopted by a newly-decided district court case within the Third Circuit, *In re Sunrise Securities Litigation,* 698 F. Supp. 1256 (E.D. Pa. 1988), under which the offset would be the "proportional" culpability of the settling defendants, as determined at trial. The court chose the *Sunrise* rule, affirming the district court's order barring contribution, but "remand[ing] the order to the district court so that . . . it may refashion its order," App. at 23a, to provide for a proportional setoff with respect to liability under Section 11, and a pro tanto setoff against damages for California law claims.

In other words, as to plaintiffs' federal claims, the court permitted a bar against cross-claims for contribution, but exacted a "price" from plaintiffs for that bar: elimination

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section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

15 U.S.C. § 77k(f).

[9]*Singer v. Olympia Brewing Co.,* 878 F.2d 596 (2d Cir. 1989); *accord, e.g., Dalton v. Alston & Byrd,* Civ. No. 85-4302 (S.D. Ill. May 24, 1990) (publication pending), *reprinted at* Appendix F; *In re Atlantic Financial Management, Inc. Securities Litigation,* 718 F. Supp. 1012, 1017-18 (D. Mass. 1989). *See also Restatement (Second) of Torts* § 885(3); Uniform Contribution Among Tortfeasors Act § 4 (1955); *Process Masters, Inc. v. Alpha III Ltd. Partnership,* 477 So. 2d 69 (Fla. Dist. Ct. App. 1985); *Bishop v. Klein,* 380 Mass. 285, 402 N.E.2d 1365, 1371 (1980); Cal. Civ. Proc. Code §§ 877, 877.6 (West 1980 & Supp. 1990); Fla. Stat. Ann. §§ 768.041, 768.31(5) (1986); Ill. Rev. Stat., ch. 70 ¶ 302 (1989); Mass. Gen. L., ch. 231B § 4 (1986); Wash. Rev. Code § 4.22.060 (1989).

of Congressionally mandated joint and several liability. The court held that the settlement would not result in a $9.25 million credit against damages if the case went to trial against Bache and Peat Marwick, but instead that the "proportional culpability" of Kaypro and its officers and directors would be decided by the jury, and that proportional amount of total damages would be deducted from total damages.

Thus, for example, if the jury found Bache and Peat Marwick jointly and severally liable on the federal claims and calculated damages at $25 million, but found Kaypro and the settling officers and directors 90% "proportionally responsible," plaintiffs' verdict would be for only $2.5 million despite the fact that they (a) won their $25 million case against two solvent defendants, and (b) settled with Kaypro and its officers and directors for what they reasonably believed to be the maximum which could have been recovered from them. Ironically, in such circumstances, plaintiffs would have been better off to spurn settlement, try the case against all defendants, and collect the full $25 million judgment from Bache and Peat Marwick, leaving them to seek contribution from the bankrupt company, its penurious officers, and its rapidly diminishing insurance coverage. By acting responsibly and settling with several defendants for a large portion of their insurance coverage, plaintiffs were punished. For this reason, the decision below plainly discourages settlements, contrary to the longstanding principle that settlements are to be encouraged. Fed. R. Civ. P. 16(c) Advisory Committee Note; *see* Fed. R. Evid. 408 Advisory Committee Note; *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1389 (9th Cir. 1987).

In choosing between the *Singer* and *Sunrise* rules, the court first stated that a disadvantage of the *Singer* rule is that:

> Plaintiffs may be tempted to engage in collusion with certain defendants. By accepting a low partial settlement, plaintiffs would be able to fund further litigation with no diminution of the total amount eventually received. Similarly, plaintiffs could effect low settlements with defendants who had limited resources, and thereby force wealthier defendants to pay more than if all parties proceeded to trial.

App. at 17a-18a.

Leaving aside the fact that the "good faith" hearing before the district court is intended specifically to weed out collusive settlements, and that there was a *finding of fact* here of *no collusion,* App. at 32a, the court below erred gravely in this analysis. Under the *Singer* pro tanto rule, "wealthier defendants" *would not pay* "more than if all parties proceeded to trial." If they are found liable, a trial will result in joint and several liability, they will pay *all* of the judgment, and will retain only the problematic right to seek contribution from the defendants with "limited resources."[10] The *Singer* pro tanto rule affords them a

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[10]Of course, there is an additional reason defendants might have to pay more under the Ninth Circuit's novel ruling — because the Court of Appeals abolished the so-called "one satisfaction rule" which holds that a plaintiff may recover only the amount of his injuries, and that this right to actual compensation is to be satisfied only once. The court rejected the Second Circuit's analysis, reasoning that "it is not entirely clear that the one satisfaction rule applies" and that "[w]e are not convinced that the efficient and equitable administration of th[e] statutorily mandated right [of contribution] must yield to the logic of a general rule." App. at 22a. Thus, in this case if the nonsettling defendants were found to be 90% culpable at trial, they would be entitled to only a 10% setoff and would be required to pay

certain setoff of $9.25 million, which is at least a fair substitute for an uncertain right to seek contribution after trial from Kaypro, which is in bankruptcy, its officers and directors, who are of limited means, and their insurance, which would diminish day by day. Moreover, the $9.25 million negotiated by plaintiffs is presumptively a fair contribution by these settling defendants, not only because of the district court's approval, but also because plaintiffs' incentive was to maximize this recovery which, in the event of a verdict in favor of Bache and Peat Marwick, would be the only recovery the class would get.

After rejecting the *Singer* "offset" rule by ignoring the plaintiffs' right to the joint and several liability mandated by Congress, the Ninth Circuit embraced the *Sunrise* "proportional liability" rule as better satisfying three goals: "[T]he statutory goal of punishing each wrong-doer, the equitable goal of limiting liability to relative culpability, and the policy goal of encouraging settlement." App. at 19a.

As to the first and third goals, the court offered no reasons for concluding that the *Sunrise* rule was superior to the *Singer* rule. Its discussion of punishment fails to discuss or compare the likely impact of the two rules, App. at 20a, and the discussion of encouraging settlement consists only of a blithe assertion that "[d]efendants that are inclined to settle may do so without penalty or risk." App. at 20a. That, of course, is true under either rule, but only if the plaintiffs are willing to settle. Because the Ninth Circuit effectively holds that settlement deprives

90% of the total damages of $25 million, or $22.5 million. Considering the fact that plaintiffs already have received $9.25 million from the settling defendants, their total recovery would be $31.75 million even if they suffered actual damages of only $25 million.

plaintiffs of joint and several liability, plaintiffs seldom will be willing to enter partial settlements.[11]

The linchpin of the Ninth Circuit's selection of the *Sunrise* rule was its desire to achieve "equity between wrongdoers" by "limiting liability to relative culpability." App. at 19a. The court reasoned that under a rule of proportional setoff "[n]onsettling defendants never pay more than they would if all parties had gone to trial." App. at 21a. *But they often will pay less, because to settle with some defendants the plaintiffs must forfeit the right to be made whole.*

Simply put, the Ninth Circuit has exalted its concept of "equity between wrongdoers" and "limiting liability to relative culpability" — which are nowhere found in the 1933 or 1934 Acts — above the remedial and compensatory purposes of the federal securities laws that are their very reason for existence. The court has ignored the legislative policy — made effective through joint and several liability — and shifted the risk, of inability to collect from a defendant with significant culpability but limited resources, from the joint tortfeasors to the innocent victim. This is the central and crucial error below.

Having clearly imposed the *Sunrise* proportionality rule upon the Section 11 claims, and having affirmed that the pro tanto rule governed the California claims, the Court of Appeals did not explicitly address the offset under Section 12 of the 1933 Act or Section 10(b) of the 1934 Act. It did, however, reaffirm that there is an implied

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[11]The pro rata reduction of plaintiffs' recovery works "strongly against the interest of the injured party and may have the effect of discouraging him from entering into a settlement." *Restatement (Second) of Torts* § 886A, Comment m. *Accord Dalton v. Alston & Byrd,* Civ. No. 85-4302 (S.D. Ill. May 24, 1990) (publication pending), *reprinted at* Appendix F, at 69a-75a.

right of contribution under Section 10(b). App. at 8a-9a. Thus the decision below imposes the proportionality rule upon one of the most important damage rights under the federal securities laws, and appears to impose it upon two others which do not even have explicit rights to contribution.

II.

ARGUMENT

The decision below undermines joint and several liability, handicaps securities fraud victims in their efforts to be made whole, discourages partial settlements, and conflicts with the law in other circuits. It compounds this error by adhering to the Ninth Circuit's prior view that a right of contribution may be implied under Section 10(b) — in disregard of this Court's recent precedents and other circuit's holdings — and then appears to apply the same settlement bar and offset rules to the Section 10(b) claim. These holdings deprive plaintiffs of the full benefit of Section 11 and Section 10(b), and at the same time, by discouraging settlement, burden the federal courts with trials that need not occur and complex trials that could be greatly simplified.

A. *Certiorari* Should Be Granted Because The Ninth Circuit's Decision Contravenes Congressionally Mandated Joint And Several Liability, Provides A Disincentive to Settlement, And For These Reasons, Conflicts With The Law Of Other Circuits

The panel's decision substantially modifies the legislatively mandated rule of joint and several liability, abolishing it for plaintiffs who choose to settle with some but not all defendants. The decision conflicts with the law in the Second Circuit and elsewhere, and will have the dramatic

practical effect of precluding partial settlements in many complex, multi-defendant securities actions because it shifts the risk that some co-defendants will be unable to satisfy the judgment from their joint tortfeasors to the plaintiffs.

For example, if a $10 million securities claim is brought against multiple defendants, and one defendant settles for $100,000, representing every cent he has, under the Ninth Circuit's ruling, the jury would determine the proportional liability of the settling defendant at trial (in his absence), and if it found him 50% responsible, ***his $100,000 settlement would reduce plaintiffs' claims against the other defendants by $5 million!*** However, under the majority rule that plaintiffs urge, the non-settling defendants would remain potentially liable for $9.9 million, which is precisely what joint and several liability requires.

Thus the Court of Appeals' ruling would impel a rational plaintiff to *reject* the $100,000 offer in the circumstances described above for fear of unduly diminishing his total recovery, even though it was all that defendant had. Plaintiff, the would-be settling defendant, the court and the jury would be forced unnecessarily to contend with the liability of that defendant through trial. The result of the Ninth Circuit's new rule — forced litigation between litigants willing to settle — is absurd.

The decision below turns reality inside out by suggesting that its novel rule is required to prevent wealthy non-settling defendants from paying *more* than they would otherwise be required to pay after trial. The panel erroneously stated that, if the Second Circuit's pro tanto rule were adopted:

> [P]laintiffs could effect low settlements with defendants who had limited resources, and thereby *force*

> wealthier defendants to pay more than if all parties proceeded to trial.

App. at 18a (footnote omitted, emphasis in original). *That is simply wrong.* Liability is joint and several, and if all parties proceeded to trial, the "wealthier defendants" *would* pay more than their "proportional share" because of their inability to collect contribution from their impecunious co-defendants.

The policy issue presented here is one of exceptional importance. The issue presented is crucial to numerous pending securities cases, including several large class actions arising from the recent savings and loan scandal. For example, in *In re ACC/Lincoln Savings Securities Litigation,* MDL 834 (D. Ariz.), defendants include Charles Keating, numerous officers and directors of the now-infamous Lincoln Savings and Loan, and several professionals — law firms, accounting firms, investment banking firms. If plaintiffs wish to effect settlements with any of the impecunious and underinsured officers and directors, with the now-defunct Lincoln, or with its bankrupt parent company, they would run the risk of forfeiting much of the potential liability of the professionals, upon a jury finding that Lincoln and its officers were 75%, 85% or even 95% responsible for the wrongdoing. Because of the decision below, these defendants will have to remain in the case, depleting available insurance and further complicating the matter for the court and the jury, so that a joint and several verdict can be obtained and collected fully against the culpable professionals. Thus the professionals' virtually meaningless right to contribution against insolvent joint tortfeasors has been transformed, by the decision below, into a powerful weapon designed to block otherwise reasonable settlements with such parties. Such a rule of law is grotesquely counter-productive.

The panel's decision substantially affects rules of national applicability upon which there should be uniformity. For these reasons, discussed more fully below, *certiorari* should be granted.

1. The Decision Below Conflicts With The Law In Other Circuits

As noted above, the Ninth Circuit explicitly rejected the Second Circuit's resolution of this issue. See App. at 17a-19a, 21a-22a, rejecting *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-600 (2d Cir. 1989).

Aside from the Second Circuit, district courts in the First, Fifth and Seventh Circuits have flatly rejected the rule applied below, for precisely the reasons urged here, and particularly, because of the discouragement of settlements. The *Sunrise* case in the Third Circuit is in accord with the Ninth Circuit's reasoning, leaving the Circuits badly split on this important issue.

In *Dalton v. Alston & Byrd,*[12] an Illinois district court carefully analyzed the Ninth Circuit's position and rejected it in favor of the *Singer* rule:

> The Court believes that the *Singer* approach is the better approach to this problem. First, the *Singer* approach is much easier in application. The jury need not determine the relative fault of all defendants, including those defendants who are no longer participating in the trial. Under the *Franklin* approach an exact apportionment of liability needs to occur at some point, i.e. at the trial. Second, the *Singer* approach is equitable. The fairness hearing ascertains whether the settlement is fair in light of the potential liability of the defendant and in light of the

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[12]Civ. No. 85-4302 (S.D. Ill. May 24, 1990) (publication pending), *reprinted at* Appendix F, at 69a-75a.

chances of recovery. Thus, the fairness hearing prevents other defendants from paying far in excess of their share of liability. Even under the one-satisfaction rule, fairness hearings need not become more complicated than they already are. Under the one-satisfaction [rule] no such apportionment ever needs to be made. Third, the *Singer* approach provides finality to the settlement. The settling defendants are no longer a part of the litigation, and thus large portions of the trial may be omitted. Under the *Franklin* approach, the settling defendants' liability needs to be determined, and thus their activities remain part of the trial. Fourth, the *Singer* approach encourages settlements, while the *Franklin* approach discourages settlements. Under *Singer*, the uncertainties of trial are increased, and thus parties are more likely to settle. Under Franklin, a party is guaranteed that it will never pay more than its share of the damages, thus decreasing the risks of trial.

Most importantly, the entire focus of the *Franklin* court is on fairness to the defendants. A court's role in approving a class action settlement is to insure that the settlement is fair to the absent class members. This does not give a court carte blanche to disregard the rights of non-settling defendants. However, in determining the effect of a bar order, the court must weigh the interests of both the non-settling defendants and the plaintiffs. The defendants are not absent; they have a full and fair opportunity to be represented by individual counsel. The defendants have the opportunity to protect themselves if it appears that the settlement will result in higher liability (either by objecting to the settlement or by entering into a settlement themselves). Furthermore, plaintiffs are prejudiced under the *Frank-*

lin approach. This approach allows the non-settling defendants to adopt a trial strategy of blaming the settling defendants for the plaintiff's injury in the hope that their share of the total liability will thus be smaller. . . .

> Another reason for adopting the *Singer* approach is that it is in line with state law. See Ill. Rev. Stat. ch. 70 § 302; Restatement (Second) of Torts § 885(3) (1979). Since most federal securities claims will also have pendent state law claims, an approach which is compatible with state law would be much easier to administer.

Dalton, App. at 72a-74a.

Similarly, *In re Atlantic Financial Management Inc. Securities Litigation,* 718 F. Supp. 1012, 1018 (D. Mass. 1988), follows *Singer* and explains the drawbacks of the Ninth Circuit's approach:

> Delaying final determination of the amount of the set-off deprives the plaintiff class of one of the chief inducements to settle: certainty. Particularly in class actions, this method generates significant practical difficulties as well, in that the indeterminate impact of any partial settlement would make it difficult to frame a notice to the class which fairly presents the merits of the proposed settlement. Furthermore, in complex securities litigation, the burden on the jury's time and perception is already considerable. To add to this burden the task of apportioning fault between absent and present defendants would obviate much of the advantage of partial settlement to the judicial system itself.

Finally, a Texas district court recently rejected the decision below in favor of a *Singer* pro tanto rule in *In re*

Terra-Drill Partnerships Securities Litigation, 726 F. Supp. 655, 656-57 (S.D. Tex. 1989).[13]

The decision below also conflicts with numerous federal decisions where courts, without specifically addressing the alternative of a proportionate reduction, apply a dollar-for-dollar credit to reduce a judgment for an amount obtained by settlement. *E.g., Miller v. Apartments & Homes of New Jersey, Inc.,* 646 F.2d 101, 110 (3d Cir. 1981) (reducing judgment *pro tanto* rather than *pro rata* in civil rights action); *Gould v. American-Hawaiian Steamship Co.,* 535 F.2d 761, 784 (3d Cir. 1976) (offsetting judgment in securities cases by amount of prior settlement); *Screen Gems — Columbia Music, Inc. v. Metlis & Lebow Corp.,* 453 F.2d 552, 554 (2d Cir. 1972) (same in copyright infringement action). The approach of these cases is flatly inconsistent with the Ninth Circuit's rule.

2. The Decision Below Revokes Joint And Several Liability And Should Be Reviewed

The Court of Appeals' decision should be reviewed because it contradicts Congress' determination that violators of the securities laws are jointly and severally liable. That principle is statutorily established in Section 11(f) of the 1933 Act of 1933, 15 U.S.C. § 77k(f). *See also* 15 U.S.C. §§ 77(o), 77t(a).

The right to contribution exists between "joint tortfeasors." *Restatement (Second) of Torts* § 886A, Comment b. Where two or more persons are joint tortfeasors, each is liable to the injured party for the *entire* harm. *Id.,* § 875. Contribution was created in equity not to modify

[13]*Terra-Drill* does not present precisely the same issue as presented here, as the district judge determined that the liability of the co-defendants may not have been joint and several. It nevertheless illustrates the significance of the issue and the disagreement in the lower courts with the decision below.

the relationship between the injured party and joint tortfeasors, but to permit a joint tortfeasor who discharged the injured party's claim to recover any amount paid in excess of his equitable share from other joint tortfeasors.

The decision below oversteps proper judicial bounds by finding fault with, and judicially modifying, a statutorily mandated system in which a solvent defendant may be required to pay more than the amount for which it is "proportionally" responsible. The decision ignores the fact that as a joint tortfeasor, that defendant is liable for the *entire* harm. Thus, although the panel perceived that solvent non-settling defendants could be "forced" to pay "too much" by settlements, they in fact are obligated to pay that much if their co-defendants are insolvent.

Given this statutory regime of joint and several liability, equity requires that, when a reasonable and fair partial settlement is reached, the settling plaintiff not be penalized by forfeiting the benefits of joint and several liability. It is for these reasons, among others, that California and numerous other jurisdictions, following the leads of the Uniform Contribution Among Tortfeasors Act and Restatement, have adopted the rule urged by plaintiffs.

Indeed, the Uniform Contribution Among Tortfeasors Act was amended in 1955 precisely to conform with petitioners' position, having previously required a *pro rata* or proportionate fault reduction of a judgment.[14] The

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[14]That the earlier 1939 version of the Uniform Contribution Among Tortfeasors Act utilized a proportional fault approach is made clear by the express provision that "[w]hen there is such a disproportion of fault among the joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degree of fault of the joint tortfeasors shall be considered in

National Conference of Commissioners on Uniform State Laws ("NCCUSL") adopted a *pro tanto* (offset) reduction and eliminated proportionate fault or *pro rata* reductions specifically because of the chilling effect on settlements of the proportional rule:

> The 1939 Act provided, in Section 5, that a release of any tortfeasor should not release him from liability for contribution unless it expressly provided for a reduction "to extent of the pro rata share of the released tortfeasor" of the injured person's recoverable damages. This provision has been one of the chief causes for complaint where the Act has been adopted, and one of the main objections to its adoption.
>
> * * *
>
> The effect of Section 5 of the 1939 Act has been to discourage settlements in joint tort cases, by making it impossible for one joint tortfeasor alone to take a release and close the file. Plaintiff's attorneys are said to refuse to accept any release which contains the provision reducing damages "to the extent of the pro rata share of the released tortfeasor," because they have no way of knowing what they are giving up. The "pro rata share" cannot be determined in advance of judgment against the other tortfeasors. In many cases the chief reason for settling with one rather than another is that they hope to get more from the party with whom they do not settle. A provision for a reduction in a fixed amount will not protect the settling tortfeasor from contribution.

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determining their pro rata shares." *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Forty-Ninth Annual Conference* 244 (1939) (optional Section 2(4) recommended by draftsmen).

> No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. *Some reports go so far as to say that the 1939 Act has made independent settlement impossible.*

Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its Sixty-Fourth Year 224 (1955) (emphasis added).

3. The Decision Below Discourages Settlement

The Ninth Circuit's decision thus plainly discourages settlements. By making partial settlements dangerous for plaintiffs, the decision permits one recalcitrant defendant to force an entire multi-defendant case to trial. For example, in the case below, if the Ninth Circuit's rule had been known from the outset, plaintiffs would not have settled with Kaypro and its eight officers and directors, forcing a jury trial of all 11 defendants upon an already busy district court. Under the *Singer* rule, Kaypro and the officers and directors would be out of the case, and at most, a two-defendant case would be tried. Moreover, Bache and Peat Marwick, facing the joint and several liability which Congress mandated, might well have settled subsequently, concluding the entire case. Under the Ninth Circuit's rule, no one would settle, but Bache and Peat Marwick would face the same joint and several liability at trial. Even if Peat Marwick also offered to settle, Bache could offer nothing, and force plaintiffs to choose between (a) settlements with all other defendants, running the risk of forfeiting much of their claim against Bache under the "proportional" reduction, or (b) a trial against eleven defendants, all but one of which are prepared to settle on terms plaintiffs find acceptable. Thus,

the rule below gives a recalcitrant defendant enormous leverage.

It should be noted that, under the Ninth Circuit's rule, even if a partial settlement were somehow forged, the trial would be made unnecessarily complex. Rather than simply trying Bache and Peat Marwick, and then applying a $9.25 million offset to the judgment, the parties would have to try, the court would have to instruct upon, and the jury would have to decide, not only whether Kaypro and each of eight officers and directors were *liable,* but also the *relative culpability* of each of them.[15] This would complicate an already protracted case. As the court pointed out in *Atlantic Financial Management*: "[I]n complex securities litigation, the burden on the jury's time and perception is already considerable. To add to this burden the task of apportioning fault between absent and present defendants would obviate much of the advantage of partial settlement to the judicial system itself." 718 F. Supp. at 1018.

The Ninth Circuit's cryptic discussion of this factor reflects a total misunderstanding of the issue. Although the court acknowledged that fostering settlement was important, it concluded that its rule *encouraged* settlements because "[d]efendants that are inclined to settle may do so without penalty or risk," App. at 21a. This comment, of course, begs the question, as the settling defendants obtain peace under either rule. The question presented is whether the "offset" rule or the "proportional liability" rule better fosters settlement, and the

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[15]It is unclear what legal standards would be applied in determining proportional fault of defendants. The jury would be left on its own to grapple with questions such as whether the Chief Financial Officer of Kaypro or its outside auditors are more responsible for a false financial statement.

answer is obvious. Plaintiffs are more likely to settle knowing what the offset will be, and defendants armed with the "wild card" jury issue of the "proportional liability" of defendants not present to defend themselves are less likely to settle. See *Dalton v. Alston & Byrd*, Civ. No. 85-4302 (S.D. Ill. May 24, 1990) (publication pending), *reprinted at* Appendix F.

B. *Certiorari* Should Be Granted To Resolve A Circuit Split Over Whether There Is An Implied Right To Contribution Among Joint Tortfeasors Under Section 12 Of The 1933 Act And Section 10(b) Of The 1934 Act

The instant case presented claims under Section 10(b) of the 1934 Act, Sections 11 and 12 of the 1933 Act, and state law. The court's discussion of the "proportional reduction" rule relies only upon Section 11(f) of the 1933 Act, but the opinion is sweeping in its language, and reiterates that there is an implied right of contribution under Section 10(b). Thus the court may well be read to impose this "proportional reduction" rule upon all of the federal claims at issue below.

The application of a "proportional reduction" rule, of course, presupposes that there is a right to contribution. The decision below explicitly states that there is such a right under Section 10(b), App. 8a-9a, and implicitly assumes such a right under Section 12. The Ninth Circuit's holding that there is an implied right to contribution among defendants pursuant to Section 10(b) conflicts irreconcilably with this Court's most analogous decisions in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981), and is in conflict with the law of other Circuits.

In *Texas Industries* and *Northwest Airlines* this Court held that federal courts may not imply a right to contribution in federal statutes if Congress did not intend to provide for one. In *Texas Industries* the Court held that no implied right of action exists under either the Sherman or the Clayton antitrust acts, because those acts "were not adopted for the benefit of the participants in a conspiracy to restrain trade." 451 U.S. at 639. Similarly *Northwest Airlines* held that contribution is not available under either the Equal Pay Act of 1983 or Title VII of the Civil Rights Act of 1964 because those statutes were not enacted for the benefit of employers. 451 U.S. at 92. The same rationale prohibits contribution under Section 10(b), a part of the 1934 Act which "was designed to protect investors against manipulation of stock prices," not to protect those who defraud the investors by manipulating the stock prices. *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988). The 1933 Act provides for contribution under certain strictly limited circumstances pursuant to Section 11(f), and there is no basis for extending Section 11(f) beyond the single instance where it was intended to apply — to Section 11 liability *which is strict liability, not founded upon a showing of fault. Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82 (1983).

The decision of the Ninth Circuit on this issue is not only in conflict with this Court's decisions in *Northwest Airlines* and *Texas Industries*, but is contrary to the law in other circuits. Although several courts initially found an implied right to contribution under Section 10(b) (and under other securities provision, such as Section 12 of the 1933 Act),[16] the majority of the recent cases have rejected these holdings, relying upon *Texas Industries* and *North-*

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[16]*E.g., Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981); *Heizer Corp. v. Ross*, 601 F.2d 330, 331-34 (7th Cir. 1979);

west Airlines.[17] Indeed, the very authority cited by the Ninth Circuit here to hold that there is a right to contribution under Section 10(b), *Heizer Corp. v. Ross*, 601 F.2d 330 (7th Cir. 1979), is no longer law in the circuit where it was rendered. *See* App. at 9a. The Seventh Circuit itself repudiated *Heizer's* reasoning in *King v. Gibbs*, 876 F.2d 1275 (7th Cir. 1989). "*King* annulled the

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Globus v. Law Research Service, Inc., 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

[17]*See e.g., Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1104-06 (4th Cir. 1989) (holding that the analysis of *Texas Industries* and *Northwest Airlines* overrules the Fourth Circuit's prior holding in *Wassel v. Eglowsky*, 542 F.2d 1235 (4th Cir. 1976) that contribution is available as to actions under section 12(2) of the 1933 Act); *Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 123-25 (N.D. Ill. 1989) (holding that the analysis of *Texas Industries* and *Northwest Airlines* overrules the Seventh Circuit's prior holding in *Heizer Corp. v. Ross*, 601 F.2d 330, 331 (7th Cir. 1979), that contribution is available as to actions under Section 10(b) of the 1934 Act); *Eastern Holdings, Inc. v. Illinois Co. Investments*, No 88. C 7108 (N.D. Ill. July 18, 1989) (Westlaw, 1989 WL 85027, *3) (1989 U.S. Dist., LEXIS 8515) (same); *First Financial Savings Bank, Inc. v. American Bankers Insurance Co.*, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 94, 827, at 94, 453-54 (E.D.N.C. 1989) (applying *Texas Industries* and *Northwest Airlines* to hold that no right to contribution may be implied as to actions under Section 10(b); *Nelsen v. Craig-Hallum, Inc.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,500, at 93, 192-93 (D. Minn. 1989) (same); *In re Professional Financial Management, Ltd.*, 683 F. Supp. 1283, 1285-87 (D. Minn. 1988) (applying *Texas Industries* and *Northwest Airlines* to hold that no right to contribution may be implied as to actions arising under Section 12(2) of the 1933 Act or Section 10(b) of the 1934 Act); *see also Delta Holdings, Inc. v. National Distillers & Chemical Corp.*, [1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,910, at 94,426 (S.D.N.Y. 1986) (no contribution under Section 12(2)); *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 956 (S.D.N.Y. 1975) (same).

reasoning in *Heizer*."[18] Applying the analysis mandated by this Court in *Texas Industries* and *Northwest Airlines*, courts in the Seventh Circuit now hold that "[n]o private cause of action for contribution may be implied under Rule 10b-5" or Section 10(b). *Robin*, 730 F. Supp. at 125.

The Ninth Circuit's blind adherence to the older authorities on this issue provides a stark contrast to the careful analysis of the Fourth Circuit in *Baker* just three months earlier. In that case, the Fourth Circuit found no implied right to contribution under Section 12 of the 1933 Act, reasoning that the statute itself does not create a right to contribution. "Indeed, the statute's protection extends to investors who purchase securities based on misleading statements of material fact; it is not solicitous of unsuccessful defendants in a federal securities action." 876 F.2d at 1105. Further, the "legislative history and the structure of the federal securities laws do not suggest the recognition of implied rights of contribution and indemnification." Notably, of the eight provisions which expressly grant a private cause of action under the 1933 Act and the 1934 Act, only three contain a right to contribution. Lowenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 Duke L. J. 543, 550; *accord Robin v. Doctors Officenters Corp.*, 730 F. Supp. at 125. There is no ground for extending the contribution provision of Section 11(f) to Section 10(b) or Section 12, and this Court should resolve the circuit split on this issue.[19]

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[18]*Robin v. Doctors Officenters Corp.*, 730 F. Supp. 122, 124 (N.D. Ill. 1989); *accord, e.g., Eastern Holdings, Inc. v. Illinois Co. Investments*, No. 88 C 7108 (N.D. Ill. July 18, 1989) (Westlaw, 1989 WL 85027, *3; 1989 U.S. Dist. LEXIS 8515).

[19]Even if this Court chooses not to take this case for a full consideration of the merits, petitioners respectfully submit that it

If the Court determines that there is no right to contribution under Section 10(b), that will permit plaintiffs to effect partial settlements without risking the viability of their Section 10(b) claims. If, however, the Court finds an implied right to contribution under Section 10(b) or Section 12, the Court can also resolve the question presented in Section A, *supra*, for purposes of Section 10(b) — the extent to which a partial settlement which bars cross-claims for contribution must reduce the liability of non-settling defendants.

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would be appropriate simply to vacate the opinion below and remand with instructions to reconsider the holding in light of *Texas Industries* and *Northwest Airlines*.

III.

CONCLUSION

The petition should be granted on all issues.

DATE: July 5, 1990

Respectfully submitted,

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APPENDIX A

[884 F.2d 1222]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE FRANKLIN, On Behalf of Himself and All Others Similarly Situated, *Plaintiffs,*

v.

KAYPRO CORPORATION; ANDREW F. KAY; DAVID KAY; ALLAN M. KAY; MARY M KAY; PRUDENTIAL-BACHE SECURITIES, INC., *Defendants.*

In re KAYPRO CORPORATION, SHAREHOLDER LITIGATION.

PRUDENTIAL-BACHE SECURITIES, INC., *Defendant-Cross-claimant-Appellant,*

v.

KAYPRO CORPORATION; ANDREW F. KAY; DAVID A. KAY; ALLAN M. KAY, *Plaintiffs-Cross-claimants-Appellees.*

In re KAYPRO CORPORATION SECURITIES LITIGATION.

GEORGE FRANKLIN, On Behalf of Himself and All Others Similarly Situated, JON QUINT; ELLEN QUINT; STEFAN REZNIK; WILLIAM B. WEINBERGER; RICHARD LOWE; PAUL L. HOLMES; EVELYN S. HOLMES, *Plaintiffs-Appellees,*

v.

KAYPRO CORPORATION; ANDREW F. KAY; DAVID A. KAY; ALLAN M. KAY; MARY M. KAY; ARTHUR B. LAFFER; BRADFORD W. RYLAND; LUDWIG WEINDLING; ROGER S. WOOLEY, *Defendants-Appellants,*

v.

PEAT MARWICK MAIN & COMPANY, *Defendant-Appellant.*

C.A. Nos. 88-5931, 88-5934.
D.C. No. CV-84-2091-N
Argued and Submitted Feb. 7, 1989.
Decided Sept. 6, 1989.

J. Anthony Sinclitico, III, Gibson, Dunn & Crutcher, San Diego, Cal., and John A. Shutkin, New York City, for defendants-appellants.

Stephen Young, Robert D. Feighner, and Ben Suter, Keesal, Young & Logan, San Francisco, Cal., for defendant-cross-claimant-appellant.

William S. Lerach, Milberg, Weiss, Bershad, Specthrie & Lerach, San Diego, Cal. and Michael P. Fuchs, Wolf Popper Ross Wolf & Jones, New York City, for plaintiffs-defendants-cross-claimants-appellees.

Appeal from the United States District Court for the Southern District of California.

Before FARRIS, FERGUSON and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

This is an appeal from a pretrial order by the district court approving settlement with some but not all defendants in a securities action. The class action consists of cases consolidated as *In re Kaypro Shareholders Securities Litigation,* No. 84-2091-N(I). The plaintiff class includes all persons, except defendants, who acquired common stock of Kaypro Corporation between August 25, 1983 and July 17, 1984. The defendants are Kaypro Corporation, eight of its officers and directors, Peat Marwick Main & Company, and Prudential-Bache Securities, Inc., named in its corporate capacity and as the representative of a class of underwriters. Because substantial legal rights of Prudential-Bache and Peat Marwick are affected by the district court's order, they have standing to appeal. *Waller v. Financial Corp. of America,* 828 F.2d 579, 583 (9th Cir. 1987). We have jurisdiction pursuant to rule 54(b) of the Federal Rules

of Civil Procedure, and we affirm in part and remand in part.

I

The plaintiffs' complaint alleges that on August 25, 1983, Kaypro commenced an initial public offering of four million shares of Kaypro common stock at the price of ten dollars per share. The complaint further alleges that between August 25, 1983 and July 17, 1984 the defendants distributed false and misleading statements and reports concerning Kaypro.

On July 17, 1984 Kaypro released its third quarter earnings report showing essentially flat earnings. In September 1984 Kaypro reported that it was unable to locate or account for inventory valued at several million dollars. Kaypro's 1984 Annual Report indicated that a twenty million dollar operating profit reported for the first nine months of the year was completely eliminated by accounting adjustments. As these and other adverse facts became known, the market price of Kaypro's common stock fell to between two and three dollars per share.

After the initial complaints were filed, the district court considered the sufficiency of the complaints, and certification of the plaintiff stock purchaser and defendant underwriter classes. The parties also undertook document and interrogatory discovery. After certifying the classes and consolidating the complaints, the district court ordered status and settlement hearings before a magistrate. After extended hearings and negotiations, the plaintiff class signed a stipulation of settlement with Kaypro and its officers and directors ("settling defendants"). Prudential-Bache and Peat Marwick ("nonsettling defendants") participated in settlement hearings but declined to join the settlement.

The plaintiffs' consolidated amended complaint seeks a damage judgment for $25 million. An analysis commissioned by the plaintiffs indicated theoretical damage of between $19 million and $22 million. Peat Marwick asserted in a settlement statement that the total damage figure did not exceed $5 million. The plaintiffs and the settling defendants agreed to settle for $9.25 million.

On October 19, 1987 the magistrate conducted a good faith hearing on the settlement. The nonsettling defendants filed briefs and participated in the hearing. After briefing and hearings extending over two months, the magistrate issued proposed findings of fact and a recommended final judgment and order of dismissal declaring that the settlement was made in good faith.

The nonsettling defendants moved for *de novo* review by the district court. After conducting its own hearing, the district court adopted the findings and conclusions of the magistrate. Both the magistrate and the district court conducted a good faith hearing in accordance with procedures specified in sections 877 and 877.6 of the California Code of Civil Procedure.[1] The nonsettling defendants now appeal and claim that the order approving settlement was impermissibly entered.

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[1]Section 877 reads [*sic*]:

> Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:
>
> (a) It shall not discharge any other such party to whom it is given from all liability for any contribution to any other parties.
>
> (b) It shall discharge the party to whom is is given from all liability for any contribution to any other parties.

A proposed partial settlement of complex, class action litigation involving the potential for substantial damages raises a number of concerns. Trial courts in which litigation is pending have a natural desire to clear court dockets of complex litigation in as expeditious a manner

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(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

Section 877.6 provides:

(a) Any party to an action wherein it is alleged that two or more parties are joint tortfeasors or co-obligors on a contract debt shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, upon giving notice thereof in the manner provided in Sections 1010 and 1011 at least 20 days before the hearing. . . .

(b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed in response thereto, or the court may, in its discretion, receive other evidence at the hearing.

(c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.

(d) The party asserting the lack of good faith shall have the burden of proof on that issue.

(e) When a determination of good faith or lack of good faith of a settlement is made, any party aggrieved by the determination may petition the proper court to review the determination by writ of mandate. The petition for writ of mandate shall be filed within 20 days after service of written notice of the determination, or within such additional time not exceeding 20 days as the trial court may allow.

as possible. This desire, however, is tempered by the need to assure factual fairness and the correct application of legal principles. *See* Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference,* 33 UCLA L.Rev. 485, 486-90 (1985).

In general, the policy of federal courts is to promote settlement before trial. "Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible." Fed.R.Civ.P. 16(c) advisory committee note; *see* Fed.R.Evid. 408 advisory committee note ("public policy favor[s] the compromise and settlement of disputes"). Settlement conferences are incorporated by rule into pretrial conferences. Fed.R.Civ.P. 16(c). In class actions such as this, a settlement requires the approval of the court. Fed.R.Civ.P. 23(e); *see* Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations,* 84 Mich.L.Rev. 308, 320-25 (1985) (discussing court supervision of settlements).

An overwhelming majority of class action suits settle before reaching trial. One study indicated that seventy-one percent of such suits filed settled before trial. Jones, *An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Lawsuits,* 60 B.U.L.Rev. 542, 544-47 (1980). The reasons for this are quite understandable. Litigation settlements offer parties and their counsel relief from the burdens and uncertainties inherent in trial. In class action litigation, plaintiffs' counsel may be encouraged to enter settlement with some defendants to obtain financial resources with which to assure payment of the costs of continuing litigation against the remaining defendants. The plaintiffs and the class they represent may view some recovery by way of

settlement more favorably than the risk of recovering nothing. Even if liability is considered certain, the present value of money received in settlement may be greater than the value of a judgment entered at some future date. Some defendants may pay a negotiated settlement sum in order to avoid litigation costs or to hedge against the risk of an excessive adverse damage verdict. The economics of litigation are such that pretrial settlement may be more advantageous for both sides than expending the time and resources inevitably consumed in the trial process.

In spite of its attractiveness, obtaining a settlement in multi-party litigation may be quite complex. The facts specified in the pleadings may give rise to cross claims or counterclaims based on contribution or indemnity. In such cases, settling defendants cannot obtain finality unless a "bar order" is entered by the court. In essence, a bar order constitutes a final discharge of all obligations of the settling defendants and bars any further litigation of claims made by nonsettling defendants against settling defendants.

The settlement agreement at issue in this appeal is expressly conditioned on obtaining an order from the district court that the nonsettling defendants' rights to contribution are satisfied and that further contribution is barred.[2] The bar order was issued after hearings before a

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[2]The settlement agreement reads:

E. The Good Faith Hearing

(i) Promptly after execution of this Stipulation, the parties hereto shall jointly move the Court for an order and judgment (the "Good Faith Order"), . . . providing, *inter alia,* (a) that the settlement embodied in this Stipulation is entered into and made in good faith, within the meaning of Sections 877 and 877.6 of the California Code of Civil Procedure, and (b) that all claims

magistrate and the district court. The nonsettling defendants argue that the bar order impermissibly infringes their right to full contribution from the settling defendants. The appeal poses a question of first impression.

II

Subsection 11(f) of the Securities Act of 1933, now codified at section 77k(f) of Title 15 of the United States Code, provides for a right of contribution among those defendants who are found jointly and severally liable in certain securities actions.

> (f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

15 U.S.C. § 77k(f). Subsection 11(f), in turn, was taken "almost bodily" from England's Companies Act 1929. 3 L. Loss, Securities Regulation 1737 (1961); *see* Companies Act, 1929, 19 & 20 Geo. 5, ch. 23, § 37(3).[3] Contribution is

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for contribution or indemnification, however denominated, against the Settling Defendants arising under the federal securities laws or state law in favor of persons, including Non-Settling Defendants, who are asserted to be joint tort-feasors with the Settling Defendants in Settled Claims and based upon liability in the Settled Claims are extinguished, discharged, satisfied and/or otherwise unenforceable.

[3]The Companies Act 1929 attached liability only to directors and persons who prepared the prospectus: section 11 of the Securities Act goes on to attach liability to underwriters. Dooley, *The Effect of Civil*

not limited to section 11(f) of the 1933 Act. Sections 9(e) and 18(b) of the Securities Exchange Act of 1934 also provide for contribution.[4] Furthermore, it has been determined that a right to contribution exists under claims based on section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities Exchange Commission's rules, 17 C.F.R. § 240.10b-5. *See, e.g., Heizer Corp. v. Ross,* 601 F.2d 330, 334 (7th Cir.1979).

There is no question that the *right* to contribution is governed by federal law. In *Laventhol, Krekstein, Horwath & Horwath v. Horwitch* we recognized that "[section] 77k(f) has said it all." 637 F.2d 672, 675 (9th Cir.1980), *cert. denied,* 452 U.S. 963, 101 S.Ct. 3114, 69 L.Ed.2d 975 (1981). In *Smith v. Mulvaney* we went on to hold that contribution, as guaranteed by section 77k(f), is not pro rata, but is based instead on the actual relative culpabilities of the tortfeasors. 827 F.2d 558, 561 (9th Cir.1987).

Merely saying, however, that cotortfeasors have a right to contribution based on relative culpability says very little. The federal securities laws do not specify how the contribution right applies in the case of a partial settlement. Nor are there any other well-established standards in this area. Early American and English common law had a rule *against* contribution among joint tort feasors. This rule sprang from the case of *Merryweather v. Nixan,*

Liability on Investment Banking and the New Issues Market, 58 Va.L.Rev. 776, 793 (1972).

[4]The language is almost identical to that used in section 11(f):

> Every person who becomes liable to make payment under this [sub]section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

15 U.S.C. § 78i; 15 U.S.C. § 78r.

101 Eng.Rep. 1337 (1799). Early American courts applied the rule only to cases of willful misconduct; however, once procedural rules were changed to allow joinder of persons who had negligently caused the same damage, courts began to apply the rule generally. W. Keeton, D. Dobbs, R. Keeton and D. Owen, Prosser & Keeton on the Law of Torts § 50, at 337 (5th ed. 1984). By the beginning of this century, the rule had become entrenched in nearly every jurisdiction.

The extension of the rule against contribution to negligent tort feasors engendered much criticism.[5] The rule was criticized as enormously unfair and for facilitating collusion between plaintiffs and wrongdoers. *See Skinner v. Reed-Prentice Division Package Machinery Co.,* 70 Ill.2d 1, 13, 15 Ill.Dec. 829, 834, 374 N.E.2d 437, 442 (1977), *cert. denied,* 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978). In 1939 the American Law Institute proposed a Uniform Contribution Among Tortfeasors Act.[6] An

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[5]Nearly a hundred years after the *Merryweather* case was decided, and nearly one hundred years before our current decision, Professor Reath wrote:

> It is singularly unfortunate, and has led to misunderstanding, that *Merryweather v. Nixan* should have been continually treated as stating the "general rule." As a matter of fact, that case states not the rule, but the exception. The general rule is that among persons jointly liable the law implies an assumpsit either for indemnity or contribution, and the exception is that no assumpsit, either express or implied, will be enforced among wilful tortfeasors or wrongdoers.
>
> Reath, *Contribution Between Persons Jointly Charged for Negligence — Merryweather v. Nixan.* 12 Harv.L.Rev. 176, 177 (1898).

[6]This came on the heels of England's Law Reform (Married Women and Tortfeasors) Act of 1935, 25 & 26 Geo. 5, ch. 30, § 6, which abolished the rule against contribution.

amended Uniform Act was proposed in 1955. By the 1970s, "half a century of vigorous attack upon the original rule [ ] had its effect in the passage of statutes in most states, which to a greater or lesser extent permit contribution among tortfeasors." Prosser, § 50, at 338.

In short, contribution was not part of the early American common law, and in fact was actively disapproved by the courts. It has been resurrected jurisdiction by jurisdiction. Many states have adopted the Uniform Act, some have created their own statutory scheme, and a few have adopted contribution through judicial decree.[7] Far from vanishing, *see* Reath, *supra* note 5, at 178, contribution has become a vibrant and complex facet of the law.

Against this general background can be viewed the development of contribution in federal securities law. As with contribution in state jurisdictions, it is the product of a statutory mandate. Unlike most state schemes, however, section 77k(f) is not supported by any statutory or regulatory infrastructure, nor is there a large body of case law. Congress has not enacted the Uniform Contribution Among Tortfeasors Act or provided any other statutory guidance.

The legislative history of section 11(f) of the Securities Act is very sparse. *See* Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting Conspiracy in Pari Delicto, Indemnification and Contribution,* 120 U.Pa.L.Rev. 597, 650 & n. 236 (1972). It is clear, however, that Congress intended the section to complement the overall purposes of the act. The overarching purpose of the Securities Act of 1933, and of the subsequent Securi-

[7]See ABA Antitrust Section, Contribution and Claim Reduction in Antitrust Litigation 6 & nn. 37-39 (1986) (listing sources of contribution rights in 39 states and District of Columbia).

ties Exchange Act of 1934, was to restore confidence in the market. Confidence was to be restored by forcing the public disclosure of facts sufficient to permit prudent investors to understand the risks assumed when purchasing a security offered for sale to the public. One of the most important changes brought about by the legislation was that it made accountable *all* parties who were responsible for public reports. *See* H.R.Rep. No. 85, 73d Cong., 1st Sess. 9 (1933); Scott, *Resurrecting Indemnification: Contribution Clauses in Underwriting Agreements,* 61 N.Y.U.L.Rev. 223, 234-38 (1986).

Much of the early attention paid to the new federal right to contribution focused on the phrase "as in cases of contract." This phrase was also found in the English statute; its inclusion there was most likely intended to eliminate problems that then[8] existed in English tort law. *See* Douglas & Bates, *The Federal Securities Act of 1933,* 43 Yale L.J. 171, 178 & n. 30 (1933). Reliance on this phrase, however, is not helpful to the student of contribution. In one of the two opinions we have issued on section 77k(f) we wrote that "Congress more likely intended the phrase 'as in cases of contract' to express a departure from the traditional no contribution rule of tort law." *Smith,* 827 F.2d at 561. Since we recognize the doctrine of contribution among joint tortfeasors in securities cases, we must determine the source of law to be applied in the context of a pretrial settlement reached by some but not all defendants.

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[8]The rule against contribution was not statutorily overridden in England until 1935. *See supra* note 6.

III

The nonsettling defendants concede that there is no statutory provision and no established federal common law which provides an easy resolution to this appeal. *Cf. Herzfeld v. Laventhol, Krekstein, Horwath & Horwath,* 378 F.Supp. 112, 135 (S.D.N.Y.1974) (describing federal parameters as a "vacuum"), *modified on other grounds,* 540 F.2d 27 (2d Cir.1976). That contribution is a complex matter can be illustrated merely by thumbing through the hundreds of pages in a treatise such as *American Jurisprudence Second* that elucidate state-law rights to contribution. That our two prior decisions, *Laventhol* and *Smith,* do not provide full guidance is amply demonstrated by the fact that both sides vigorously argue that both opinions support them.

In this vacuum, courts have adopted a variety of approaches to partial pretrial settlements. A number of district courts have, as in this case, adopted the law of the forum state. *E.g., Kirkorian v. Borelli,* 695 F.Supp. 446 (N.D.Cal.1988); *Herzfeld,* 378 F.Supp. at 135. Use of forum state law has several advantages. The courts and the parties are given a comprehensive body of applicable law.[9] Federal and state claims in a given lawsuit can be decided uniformly. *See First Federal Savings & Loan v. Oppenheim, Appel & Dixon,* 631 F.Supp. 1029, 1036 (S.D.N.Y. 1986). These qualities are not taken lightly. We feel, however, that the disadvantages are greater. Not all forums have laws governing contribution. *See Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO,* 451 U.S. 77, 87 n. 17, 101 S.Ct. 1571, 1578 n. 17,

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[9]In this case, for example, the section 877.6 good faith hearing has been thoroughly explicated by the California Supreme Court in *Tech-Bilt, Inc. v. Woodward Clyde & Assocs.,* 38 Cal.3d 488, 698 P.2d 159, 213 Cal.Rptr. 256 (1985).

67 L.Ed.2d 750 (1981) (Thirty-nine states and the District of Columbia allow contribution.) Nor are laws governing contribution uniform: some states adopted the Uniform Act, some created their own statutory scheme, and some adopted contribution through judicial fiat. *See id.* Furthermore, even those forums that have identical statutory language will diverge when their courts interpret and refine the laws. Such an environment would be chaotic to both litigants and courts. Results would be disparate and forum shopping would be rampant.

We agree, therefore, with those courts that have called for the creation of federal common law to govern this issue.[10] *See, e.g., Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599 (2d Cir.1989); *In re Sunrise Securities Litigation*, 698 F.Supp. 1256, 1257 (E.D.Pa.1988). Partial settlements and bar orders affect substantive rights that are the province of federal courts in securities actions.[11] *Compare Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir.)

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[10]It is important to distinguish an action under the securities law from an action under, for example, civil rights laws. The Supreme Court has held that there can be no federal common law governing contribution in civil rights actions because there is no federal right to contribution in the first place. In securities law there is a statutorily created right to contribution; it is analogous to federal antitrust laws. However, because Congress has not yet created laws governing the right it created, the federal courts are free to fashion a common law. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638-646, 101 S.Ct. 2061, 2065-2070, 68 L.Ed.2d 500 (1981).

[11]"Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent on a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' " *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728, 99 S.Ct. 1448, 1458, 59 L.Ed.2d 711 (1979) (quoting *United States v. Standard Oil Co.*, 332 U.S.. 301, 310, 67 S.Ct. 1604, 1609, 91 L.Ed. 2067 (1947)).

(federal law governs substantive issue of prejudgment interest), *cert. denied*, 414 U.S. 975, 94 S.Ct. 287, 38 L.Ed.2d 218 (1973) *with Wood v. Combustion Eng'g, Inc.*, 643 F.2d 339, 341-42 (5th Cir.1981) (state law governs procedural issue of applicable statute of limitations).

IV

As a basis for establishing the federal common law, the parties and the federal decisional law present us with three alternatives. We discuss each in turn.

The nonsettling defendants urge us to prohibit settlements that bar further contribution. They contend that contribution is a statutorily vested right that cannot be divested before a full trial. They argue that, even if our prior decisions do not define the contours of contribution, they at least prohibit bars to further contribution before a full trial. Nonsettling defendants read too much into the decisions. There is nothing in either the statute or our prior decisions that says contribution cannot be satisfied prior to a full trial. *See In re Nucorp Energy Securities Litigation*, 661 F.Supp. 1403, 1408 (S.D.Cal.1987). In *Laventhol*, although we did hold that that particular settlement agreement could not be enforced, we noted that "[i]f it could be said that [the settling defendants'] settlement with the plaintiff class had resulted in their bearing their proper share of damages, the case might be different." 637 F.2d at 675[12].

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[12]In *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, the Second Circuit found that a settling defendant that paid more than its fair share in a partial settlement "removed itself from the category of a tort-feasor defendant" and was no longer subject to contribution. 540 F.2d 27, 38 (2d Cir.1976). As we explain later in this opinion, the scheme we now adopt would *not* require any proof of good faith beyond that required by Rule 23.

Smith came to us in a different procedural posture: we were asked to review a summary judgment in favor of settling defendants. We found "that the evidence on which the trial court based its decision fail[ed] to support adequately a conclusive finding that the settling defendants paid their proper share of damages." 827 F.2d at 561.

The nonsettling defendants simplistic approach would preclude partial pretrial settlement.[13] In *Laventhol* we noted that the "right of contribution is enunciated clearly [in section 77k(f)]; the statute is silent as to the encouragement of settlements." 637 F.2d at 675. The nonsettling defendants seize upon this silence as evidence that settlement should be discouraged. The nonsettling defendants read too much into the silence. As we have noted before, "it hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits. . . ." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir.1976). The Southern District of California explained why not allowing contribution rights to be satisfied before trial would eliminate partial settlements:

> [I]f the non-settling defendants' construction is correct then partial settlement of any federal securities question before trial is, as a practical matter, impossible. Any single defendant who refuses to settle, for whatever reason, forces all others to trial. Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be

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[13]The nonsettling defendants' argument also ignores the primary purpose of section 11(f), which is to punish every wrongdoer, and instead elevates a corollary of the purpose, which is that wrongdoers may seek contribution from one another.

> derived to be determined in a trial where they are not even represented.

Nucorp Securities Litigation, 661 F.Supp. at 1408.

In short, we do not believe that Congress intended to preclude partial settlements, nor do we think Congress intended the right to contribution to be inextinguishable. Therefore, we decline to prohibit orders that bar further contribution.

A second alternative is suggested by the Second Circuit. *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir.1989). Under this scheme the settlement payment acts as an offset: the entire amount of damage is determined at a full trial, the settlement amount is deducted from that amount, and the nonsettling defendants are required to pay the remainder.

The strongest argument for adoption of this rule is that it adheres to the one satisfaction rule. "It is a fundamental legal principle that an injured party is ordinarily entitled to only one satisfaction for each injury." *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1236 (10th Cir.1988). Because the settlement amount is merely offset from the total amount, the combined amounts paid by the settling defendants and by the nonsettling defendants can never be larger than the total amount of damages sustained by the plaintiffs.[14] For reasons we explain later, we think this advantage is illusory.

There are several disadvantages to this scheme. Plaintiffs may be tempted to engage in collusion with certain defendants. By accepting a low partial settlement, plaintiffs would be able to fund further litigation with no

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[14]Unless, of course, the settlement amount is larger than the total amount of damages determined at trial.

diminution of the total amount eventally received. Similarly, plaintiffs could effect low settlements with defendants who had limited resources, and thereby *force* wealthier defendants to pay more than if all parties proceeded to trial.[15]

Some argue that a good faith hearing prevents these evils. We disagree. In the first place, a good faith hearing "means bogging down the settlement process in a miniature trial before trial." *Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir.1985). In order to be truly efficacious, the good faith hearing would require a full evidentiary hearing on all of the parties' relative culpabilities. This would negate many of the benefits of settlement.

Futhermore, the very dynamics of settlement guarantee that, even with a good faith hearing, the offset scheme forces nonsettling defendants to pay more than the amount for which they are culpable. Settlement is attractive to parties because it reduces litigation costs. Therefore, plaintiffs are willing to settle for less than they might receive if a claim were fully litigated.[16] *See* Elliot, *Managerial Judging and the Evolution of Procedure*, 53

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[15]If the total amount of damages determined at trial is T, the settling defendants relative culpability is S, and the nonsettling defendants relative culpability is N, then $S + N = T$. T remains constant. Thus, if settling defendants pay any amount less than S, that amount *must* be added to the amount paid by nonsettling defendants. $(S - x) + (N + x) = T$.

[16] Settlements offer other benefits that might induce plaintiffs to accept smaller amounts.

> Settlements are desirable, not just because trials are costly... but because settlements allow parties to "manage their own disputes" and avoid the uncertainties and limitations of the winner-take-all, imposed decisions that courts make in fully litigated cases. Settlement also offers privacy to litigants and

U.Chi.L.Rev. 306, 332-33 (1986). Courts are instructed to allow this discounting when determining whether a partial settlement was entered in good faith. *See Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 38 Cal.3d 488, 499, 698 P.2d 159, 166, 213 Cal.Rptr. 256, 263 (1985) (explaining Cal.Code Civ.P. § 877.6); *Manual for Complex Litigation 2d* § 30.44 (1986) (discussing Fed.R.Civ.P. 23). Plaintiffs are willing to forego this money, and courts correctly approve the discount. Nonetheless, under the offset scheme, nonsettling defendants are forced to pay to plaintiffs the amount of the discount.

In *Smith v. Mulvaney*, we were asked to determine whether the right to contribution should be apportioned on the basis of relative culpability or on a pro rata basis. 827 F.2d at 559. We found that "[c]ontribution is an equitable doctrine. To apportion damages without regard to fault reduces, to an extent, the equity which the doctrine was intended to provide." *Id.* at 561. Although we do not lose sight of the fact that we are speaking of equities between wrongdoers, we decline to back away from our goal of equity.

We need not do so. The final alternative, expounded by the Eastern District of Pennsylvania in *In re Sunrise Securities Litigation*, 698 F.Supp. 1256 (E.D.Pa.1988), satisfies the three goals we have discussed above: the statutory goal of punishing each wrongdoer, the equitable goal of limiting liability to relative culpability, and the policy goal of encouraging settlement.

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enables them to consider opportunities for resolutions that would not be available in a trial judgment.

D. Provine, Settlement Strategies for Federal District Judge 1-2 (1986).

This scheme contemplates a partial settlement approved by the district court under Rule 23. Nonsettling defendants are then barred from further rights of contribution from the settling defendants. At trial, the jury is asked not only to determine the total dollar damage amount, but also the percentage of culpability of each of the nonsettling defendants as well as that of the settling defendants.[17] Nonsettling defendants as a whole will then be required to pay the percentage of the total amount for which they are responsible. The nonsettling defendants will be jointly and severally liable for that percentage, and will continue to have rights of contribution against one another.

This approach satisfies the statutory goal of punishing each wrongdoer. Patently collusive or inadequate settlements are prohibited by Rule 23. To the extent that plaintiffs manage their own litigation, they could easily withdraw their complaint or settle with all defendants: there is no requirement in the statute that defendants pay a given amount of money.[18] *See Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27, 30 (2d Cir.1976) (requiring each defendant to pay a pro rata sum regardless of relative culpability).

The goal of equity is also satisfied. Settling defendants pay an amount to which they voluntarily agree. The bar on further contribution extinguishes further risk on their

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[17]Borrowing the formula used in note 15, the jury will be required to find $T = S + (N1 + N2 + N3 \ldots)$ where S and N equal the parties' relative culpabilities.

[18]Those who argue that there is a fourth goal — making the plaintiffs whole — that is not met ignore the fact that the plaintiffs voluntarily settled. There are many reasons why plaintiffs would be wise to do so. *See supra* note 16. *But see* Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

part. Nonsettling defendants never pay more than they would if all parties had gone to trial. This comports with the equitable purpose of contribution. *See Smith*, 827 F.2d at 561. Furthermore, this approach leaves the burdens of proof intact, alleviating Prudential-Bache's complaint that a good faith hearing under section 877.6 forces the burden of proof onto the nonsettling defendants. Obviously, there will be a certain amount of "finger-pointing" at the "empty chair." *See Sunrise Securities*, 698 F.Supp. at 1260. However, settling defendants will be protected by the bar order, and the financial motives of both plaintiffs and nonsettling defendants to vigorously press their arguments at trial will be unchanged.

Finally, this approach satisfies the policy goal of encouraging settlements. Defendants that are inclined to settle may do so without penalty or risk.

The Second Circuit argues that the approach we adopt may violate the one satisfaction rule. *Singer*, 878 F.2d at 600. We do not agree.

The one satisfaction rule provides that a plaintiff is only entitled to one satisfaction for any given injury. The Second Circuit paints this scenario: plaintiffs settle with some defendants for a large sum, at trial the nonsettling defendants are found to be primarily responsible for the damage and are required to pay a large sum, and plaintiffs end up with more money than they would have received if all parties had gone to trial. This, argues the Second Circuit, violates the one satisfaction rule.

In the first place, we do not believe that the plaintiffs in the above scenario have received more that one satisfaction for the same injury. All of the defendants are required to contribute, none pay the entire damages. The plaintiffs are merely receiving more money than they

might have in different circumstances. If all of the defendants had settled for a sum larger than the trial verdict, the one satisfaction rule would not be violated. There is little conceptual difference between that and only some of the defendants settling for a larger amount.

In the second place, it is not entirely clear that the one satisfaction rule applies in these circumstances. The rule is based in common law; it is not statutorily mandated. *U.S. Industries,* 854 F.2d at 1236. Contribution, on the other hand, is a statutory deviation from the common law. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 634, 101 S.Ct. 2061, 2063, 68 L.Ed.2d 500 (1981). We are not convinced that the efficient and equitable administration of this statutorily mandated right must yield to the logic of a general rule.

V

Having decided upon the proper approach for partial pretrial settlements and bar orders, we must now determine whether the order issued by the district court in this case was proper.

The district court held a Rule 23 hearing fashioned on the requirements of California Code of Civil Procedure § 877.6. Many courts have commented on the similarity between a Rule 23 hearing and hearing pursuant to section 877.6. *E.g., In re United Energy Corp. Solar Power Modules Tax Shelter Investment Securities Litigation,* Fed.Sec.L.Rep. (CCH) ¶ 94,376, at 92,466 (C.D.Cal. 1989); *Kirkorian v. Borelli,* 695 F.Supp. 446, 454 (N.D.Cal.1988). To that extent, the district court did not err.

The district court issued a bar order. As discussed above, that is resonant with the purposes of the securities laws.

The district court's order, however, fell short of the requirements we have discussed above. Although the district court's order limited nonsettling defendants' ability to seek further contribution from the settling defendants, it did not limit the subsequent exposure of the nonsettling defendants. The limit must be the nonsettling defendants' actual percentage of liability for the amount of total damages determined at trial.[19] Therefore, we remand the order to the district court so that, subject to the agreement of the settling parties, it may refashion its order as we have instructed.

VI

Finally, Prudential-Bache argues that it is protected by certain contractual indemnity clauses. We have previously held that such clauses are invalid because they are against the policy of section 77k(f). *Stewart v. American Int'l Oil & Gas Co.,* 845 F.2d 196, 200 (9th Cir.1988). The district court was correct in holding these clauses invalid.

VII

The principles of compensation and contribution are in tension with the goals of full disclosure and settlement in actions under the securities laws. We believe that the most efficacious and equitable method of resolving this tension is by adopting a rule allowing only proportional

[19]Additionally, prevailing parties will be entitled to attorney's fees. Nonsettling defendants will not be liable for costs or fees solely attributable to legal services rendered by attorneys for plaintiffs or settling defendants in effecting a partial settlement.

liability if a contribution bar is entered as part of a pretrial partial settlement. In the absence of any guidance from Congress, such a rule becomes part of the federal common law.

The parties will bear their own costs on this appeal.

AFFIRMED in part, REMANDED in part.

APPENDIX B

Master File No. 84-2091 N(M)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re KAYPRO CORPORATION
SHAREHOLDER LITIGATION

This Document Relates To:
ALL ACTIONS

FINAL JUDGMENT AND ORDER OF DISMISSAL

FILED February 1, 1988

This matter having come before the Court on the application of the parties for approval of the settlement set forth in the Stipulation of Settlement ("Stipulation") of the above-captioned Class Action, filed on September 3, 1987, and the Court having considered all papers filed and proceedings had herein and otherwise being fully informed in the premises and the Court having made findings of fact and conclusions of law accompanying this Judgment which constitute a final adjudication of this matter on the merits, and good cause appearing therefore, it is this 8th day of December, 1987

ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over the subject matter of this litigation, and all actions within this litigation and over all parties to this litigation, including all members of the Settlement Class.

2. This Court hereby approves the settlement set forth in the Stipulation and finds that said settlement is, in all

respects, fair, reasonable and adequate to the Settlement Class. The Settlement Class consists of:

> All persons who purchased or otherwise acquired the stock of Kaypro Corporation between August 25, 1983, and December 13, 1984. Excluded from the Settlement Class are the defendants herein, members of the immediate family of each of the individual defendants, any entity in which any defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any excluded party.

3. This Court hereby dismisses on the merits and with prejudice each and every Settled Claim (as defined below), of each and every Settlement Class Member (as defined in ¶ IX.A.(3) of the Stipulation) against each and all of the Settling Defendants (as defined in ¶ IX.A.(6) of the Stipulation) and the Insurers only, including, without limitation (but excluding the Non-Settling Defendants), their respective predecessors and successors, parents, subsidiaries and affiliates, and all their present and former partners, principals, officers, directors, reinsurers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators arising out of or based upon the Settled Claims and any and all claims against the Insurers under California Insurance Code, Section 790.03(h), and without costs to any of the settling parties as against the other.

4. All Settlement Class Members are hereby forever barred and enjoined from prosecuting the Settled Claims, as defined in the Stipulation, either directly or indirectly, against any or all of the Settling Defendants and the Insurers, including, without limitation (but excluding the Non-Settling Defendants), and their respective predecessors and successors, parents, subsidiaries and affiliates, and all of their present and former partners, principals,

officers, directors, reinsurers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators, including: (a) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims (as defined in the Stipulation), which exist or may in the future exist against any of the Settling Defendants by reason of any matter, cause or thing whatsoever arising out of, relating to, or in any way connected with the purchase or sale of other disposition or acquisition during the Settlement Class Period of any Kaypro common stock by a Settlement Class Member; (b) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Settlement Class Member has or may in the future have against any of the Settling Defendants by reason of any acts, omissions, or failure to act of any of the Settling Defendants during the Settlement Class Period in (but only in) their capacities as officers, directors, employees, agents and/or advisors of Kaypro; and (c) any and all claims, actions, causes of action, rights or liabilities, including Unknown Claims, which a Settlement Class Member has or may in the future have against any of the Settling Defendants arising out of or in any way connected with or related to any of the facts, circumstances, transactions, events, occurrences, acts or omissions or failures to act, of whatever kind or character whatsoever, irrespective of the state of mind of the actor performing, or omitting to perform the same, that are or could have been alleged, referred to, alluded to, or reflected in the Class Action.

5. The Class Action is dismissed with prejudice against the Representative Plaintiffs and the Settlement Class Members and in favor of the Settling Defendants without costs to any party as against the other.

6. Each and all of the Settling Defendants, and their respective predecessors and successors, subsidiaries and affiliates, and all of their present and former partners, principals, officers, directors, insurers, employees, agents, attorneys, assigns, representatives, heirs, executors and administrators are hereby and forever released and discharged with respect to any and all rights, claims, and causes of action the Settlement Class Members have, had or may have, known or unknown, arising out of, based upon or otherwise related to any of the Settled Claims, as defined in ¶ 5 above.

7. Neither the entry into the Stipulation nor the consent to this Judgment is, may be construed as, or may be used as an admission by or against any one or all of the Settling Defendants of any fault, wrongdoing, or liability whatsoever. To the extent permitted by law and the jurisdiction of this Court, the Stipulation, the settlement, this Judgment and any documents related to any of the foregoing shall not be offered or received in evidence in any civil, criminal, or administrative action or proceeding against or concerning the Settling Defendants other than such actions or proceedings as may be necessary or consummate or enforce the Stipulation and the settlement.

8. The notice given to the Settlement Class of the settlement set forth in the Stipulation and the other matters set forth therein was the best notice practicable under the circumstances, including the individual notice to all members of the Settlement Class who could be identified through reasonable effort. Said notice provided due and adequate notice of those proceedings and of the matters set forth therein, including the proposed settlement set forth in the Stipulation, to all persons entitled to such notice, and said notice fully satisfied the require-

ments of Rule 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure and the requirements of due process.

9. The entry of this Judgment shall not affect the right of any of the Settling Plaintiffs (as defined in the Stipulation) from proceeding against the Non-Settling Defendant (as defined in the Stipulation).

10. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction (a) over implementation of this settlement and any award or distribution of settlement proceeds to Settlement Class Members pursuant to further orders of this Court; (b) over disposition of the Settlement Fund; (c) over hearing and determining applications for attorneys' fees, costs, interest and expenses (including fees and costs of experts and/or consultants) in the Class Action; and (d) over all parties hereto for the purpose of enforcing and administering the Stipulation and Exhibits thereto.

11. In the event that the settlement does not become effective in accordance with the terms of the Stipulation, then this Judgment shall be rendered null and void and be vacated and the Stipulation and all orders entered in connection therewith shall be rendered null and void.

12. There being no just reason to delay the entry of this judgment, the clerk is ordered to enter this judgment forthwith.

Dated: December 8, 1987

/s/

The Honorable Harry R. McCue
United States Magistrate

So ordered February 1, 1988

/s/

Leland Nielsen, U.S. Dist. Judge

APPENDIX C

Master File No. 84-2091 N(M)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re KAYPRO CORPORATION
SHAREHOLDER LITIGATION

This Document Relates To:
ALL ACTIONS

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT THAT SETTLEMENT IS ENTERED INTO IN GOOD FAITH

FILED February 1, 1988

On October 19, 1987, the motion of the Settling Plaintiffs and the Settling Defendants, as defined in the Stipulation of Settlement filed on September 3, 1987 (the "Stipulation"), came on regularly for hearing (the "Good Faith Hearing"). The findings of fact and conclusions of law herein are based, *inter alia,* on the following matters:

1. The Court's review of the Stipulation, the briefs and other written submissions made by each of the parties in connection with said motion.

2. The Court's consideration of the oral arguments of counsel for each of the parties at the Good Faith Hearing, including counsel's responses to inquiries by the Court regarding the settlement.

3. The Court's review of the Declaration of Keith F. Park ("Park Declaration"), dated February 15, 1987 and the Exhibits A-O attached thereto, including in particular the Kaypro Prospectus, dated August 25, 1983, the

Kaypro Annual Report for 1983, the Kaypro 10K filed November 23, 1983, the Kaypro 10Q filed January 13, 1984, April 16, 1984 and July 16, 1984, respectively.

4. The Court's review and analysis of the Summary of Damage Calculations submitted with the Park Declaration, and the arguments of the defendants regarding various factors which they contend would considerably reduce the amount of damages set forth in the Summary of Damage Calculations.

5. The Court's review and analysis of the applicable policies of insurance held by, and on behalf of the Settling Defendants, submitted in connection with the Good Faith Motion by defendant Prudential-Bache Securities, Inc.

6. The Court's participation in several settlement conferences with the parties, including conferences with the non-settling defendants. Among the issues discussed in these conferences were questions of contribution and indemnity among the defendants, both from a legal and factual perspective.

7. The Court's review of all settlement conference memoranda submitted, including the Plaintiffs' Settlement Conference Statement, filed December 18, 1986.

8. The Court's analysis of the Consolidated Amended Complaint, the answers of the Defendants, the Cross-Complaint of Prudential-Bache Securities, Inc. and the state court complaint filed by Prudential-Bache Securities, Inc.

Based on the Court's review and analysis of these matters and, good cause appearing therefor, the Court

hereby makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. The overall amount of the Settlement Fund, as defined in the Stipulation, is within the reasonable range of the Settling Defendants' proportional share of liability for the Settling Plaintiffs' alleged injuries and reflects the proper and fair share of the Settling Plaintiffs' alleged damages, with due recognition being given to the risks of continued litigation against the Settling Defendants, the difficulties associated with satisfaction of any judgment against the Settling Defendants, the risk of dissipation or loss of assets of the Settling Defendants, including any applicable insurance coverage, and the fact that the Settling Defendants should pay less in settlement than if they were found liable after trial.

B. The court has considered the financial condition of the Settling Defendants in relation to their potential liability to the Settling Plaintiffs and the amount of insurance potentially available to cover the acts of the Settling Defendants and finds and concludes that the amount contributed on behalf of the Settling Defendants to the Settlement Fund, *i.e.,* Nine Million Two Hundred Fifty Thousand Dollars ($9,250,000.00) is substantial, fair and reasonable, particularly in light of the availability of coverage, the risk of imposing liability against certain of the Settling Defendants, and the difficulty associated with the satisfaction of any judgment that might be rendered against those of the Settling Defendants who are individuals.

C. There is no evidence of collusion, fraud or tortious conduct in entering into the Stipulation by any of the parties to the Stipulation aimed at causing injury to the interests of the Non-Settling Defendant.

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED AS FOLLOWS:

1. The Settlement embodied in the Stipulation is entered into and made in good faith, within the meaning of §§ 877 and 877.6 of the California Code of Civil Procedure and for all other purposes.

2. All claims for contribution, indemnification, or reimbursement, however denominated, against the Settling Defendants arising under the federal securities laws or state law, including those based in tort, contract, or statute, or any other body of law, in favor of persons, including Non-Settling Defendants, who are asserted to be or who may be joint tort-feasors or wrongdoers, however denominated, with the Settling Defendants in the Settled Claims and based upon the Settled Claims, are extinguished, discharged, satisfied and/or otherwise unenforceable.

3. Any findings of fact herein made shall also be deemed a conclusion of law, and any conclusion of law herein made shall also be deemed a finding of fact.

4. There being no just reason to delay the entry of this judgment, the clerk is ordered to enter this judgment forthwith.

Entry of this Order is recommended.

Dated: December 8, 1987

/s/
The Honorable Harry R. McCue
United States Magistrate

IT IS SO ORDERED this 1st day of February, 1988.

/s/
The Honorable Leland C. Nielsen
United States District Judge

APPENDIX D

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Master File No. 84-2091 N(M)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re Kaypro Corporation
Shareholder Litigation

This Document Relates To: ALL ACTIONS

STIPULATION OF SETTLEMENT

This Stipulation of Settlement (the "Stipulation"), dated as of June 12, 1987, is made and entered into by and among the Settling Plaintiffs, the Settling Defendants, and the Insurers, as those terms are defined herein, by and through their attorneys or their counsel of record in the actions described in Paragraph I herein.

I.

DESCRIPTION OF THE CLASS ACTIONS

On and after September 14, 1984, the following actions were filed in the United States District Court for the Southern District of California (the "Court") as class actions on behalf of all persons, except defendants, who purchased, or otherwise acquired the common stock of Kaypro Corporation ("Kaypro") between August 25, 1983 and July 17, 1984, inclusive:

Franklin v. Kaypro Corporation, et al., No. 84-2091-B(I);

Weinberger v. Kaypro Corporation, et al., No. 84-2238-T(I);

Reznic v. Kaypro Corporation, et al., No. 84-2239-K(CM);

Quint v. Kaypro Corporation, et al., No. 84-2240B(IG);

Holmes v. Kaypro Corporation, et al., No. 84-2308-GT(M);

Love v. Kaypro Corporation, et al., No. 84-2309-JLI(I)

All of the above actions (collectively referred to herein as the "Class Action") assert violations of the federal securities laws and state laws against, *inter alia,* certain of the Settling Defendants.

II.

CONSOLIDATION OF THE CLASS ACTIONS

On December 17, 1984, the Court entered Pretrial Order No. 1, which consolidated the Class Action under the caption *In re Kaypro Corporation Shareholder Litigation* and designated Milberg Weiss Bershad Specthrie & Lerach and Wolf Popper Ross Wolf & Jones, as co-lead counsel for purposes of prosecuting the Class Action and all related actions subsequently transferred to the Court. A Consolidated Amended Complaint was filed on December 19, 1984.

III.

CLASS ACTION CERTIFICATION AND NOTIFICATION PROCEEDINGS

A. Initial Class Action Determination

On May 2, 1985, the Court certified, pursuant to Rule 23 of the Federal Rules of Civil Procedure, a plaintiff class in the Class Action defined as follows:

1) For purposes of adjudicating the claims for violation of Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)), Sections 11, 12(2) and 17(a) of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77*l*(2), and 77(q), and to adjudicate plaintiffs' common law claims for fraud and negligent misrepresentation:

> All persons, except defendants, who purchased or otherwise acquired the common stock of Kaypro Corporation between August 25, 1983 and July 17, 1984.

2) For purposes of adjudicating the claims under Sections 25400 and 25401 of the California Corporations Code:

> [T]hat portion of the plaintiff shareholder class which purchased or otherwise acquired the common stock of Kaypro Corporation either on the offering of August 25, 1983 or in California in the open market between August 25, 1983 and July 17, 1984.

In certifying this class (the "Certified Class"), the Court designated the named plaintiffs in the Class Action, *i.e.*, George Franklin, Jon and Ellen Quint, Stefan Reznic, William B. Weinberger, Richard Love, and Paul L. and Evelyn S. Holmes, as representatives of the class.

The named plaintiffs in the Class Action are collectively referred to herein as the "Class Representatives."

B. Settlement Class Description

For purposes of the Settlement embodied in this Stipulation, the parties agree that the certified class shall be expanded and defined as follows (the "Settlement Class"):

> All persons who purchased or otherwise acquired the stock of Kaypro Corporation between August 25, 1983, and December 13, 1984. Excluded from the Settlement Class are the defendants herein, members of the immediate family of each of the individual defendants, any entity in which any defendant has a controlling interest, and the legal representatives, heirs, successors or assigns of any excluded party.

IV.

DISCOVERY IN THE CLASS ACTION

Counsel for the Settling Plaintiffs have been accorded and have conducted extensive discovery during the prosecution of the Class Action. The discovery had included, *inter alia*, numerous inspections of documents and informal investigations and consultation with experts. Counsel for the Settling Plaintiffs have also researched the applicable law with respect to the claims of the Settling Plaintiffs against the Settling Defendants and the potential defenses thereto.

V.

CLAIMS OF THE SETTLING PLAINTIFFS

The Settling Plaintiffs have claimed and continue to claim that each and all of the contentions made by them in the Class Action have merit. Notwithstanding this Stipulation, the Settling Plaintiffs expressly assert that the claims alleged in the Class Action have merit and give rise to liability on the part of the Settling Defendants. Neither this Stipulation nor any document referenced herein, nor any action taken to carry out this Stipulation is, may be construed as, or may be used as an admission by or against the Settling Plaintiffs that any of their claims are without merit or that the maximum of recoverable damages hereunder does not exceed the amount of the Settlement Fund. Entering into or carrying out this Stipulation, the Exhibits hereto, and any negotiations or proceedings related thereto shall not in any event be construed as, or deemed to be evidence of, an omission or concession by any of the parties hereto or a waiver of any applicable statute of limitations and shall not be offered or received in evidence in any action or proceeding by any

party hereto in any court, administrative agency or other tribunal for any purpose whatsoever other than to enforce the provisions of this Stipulation, or the provisions of any related agreement or release, except that this Stipulation and the Exhibits hereto may be filed in the District Court as evidence thereof.

VI.

BENEFITS OF SETTLEMENT
TO SETTLING PLAINTIFFS

Counsel for the Settling Plaintiffs recognize the expense and length of continued proceedings necessary to prosecute the Class Action against the Settling Defendants through trial and through appeals. Counsel for the Settling Plaintiffs also have taken into account the uncertain outcome and the risk of any litigation, especially in complex actions such as the Class Action, as well as the difficulties and delays inherent in such litigation. Each of the counsel for the Settling Plaintiffs has, therefore, determined that the settlement set forth in this Stipulation is in the best interests of the Settling Plaintiffs represented by such counsel.

VII.

SETTLING DEFENDANTS' DENIALS
OF WRONGDOING AND LIABILITY

Settling Defendants have denied and continue to deny each and all of the claims and contentions alleged by plaintiffs in the Class Action. Settling Defendants have repeatedly asserted and continue to assert many defenses thereto, and have expressly denied and continue to deny any wrongdoing or legal liability arising out of the con-

duct alleged in the Class Action. Neither this Stipulation nor any document referred to herein nor any action taken to carry out this Stipulation, is, may be construed as, or may be used as an admission by or against the Settling Defendants of any fault, wrongdoing or liability whatsoever. There has been no determination by any Court as to the factual allegations made against the Settling Defendants. Entering into or carrying out this Stipulation, and Exhibits hereto, and any negotiations or proceedings related thereto shall not in any event be construed as, or deemed to be evidence of, an admission or concession of any of the parties hereto or a waiver of any applicable statute of limitations and shall not be offered or received in evidence in any action or proceeding against any party hereto in any court, administrative agency or other tribunal for any purpose whatsoever other than to enforce the provisions of this Stipulation, or the provisions of any related agreement or release, except that this Stipulation and the Exhibits hereto may be filed in the District Court as evidence thereof.

VIII.

BENEFITS OF SETTLING TO THE SETTLING DEFENDANTS AND THE INSURERS

Settling Defendants and the Insurers have concluded that it is desirable that the Class Action be settled in the manner and upon the terms and conditions set forth herein in order to avoid the expense, inconvenience and distraction of further legal proceedings and to put to rest the Settled Claims by the Settling Plaintiffs against the Settling Defendants.

excess of the Settlement Amount with respect to the Settled Claims or claims for contribution, indemnification, or reimbursement, however denominated, against the Settling Defendants arising under the federal securities laws or state law, including those based in tort, contract or statute, or any other body of law, in favor of persons, including the Non-Settling Defendants who are asserted to be or who may be joint tort-feasors [sic] or wrongdoers, however denominated, with the Settling Defendants in the Settled Claims and based upon or arising from the Settled Claims, *i.e., any judgment entered against any Non-Settling Defendant would be reduced by the amount of the Settlement between Settling Plaintiffs and Settling Defendants or by the amount of the Settling Defendants' share of the damages, whichever is greater.* (E.R. 421-422) (emphasis added).

Therefore, petitioners contracted for the result ultimately fashioned by the appellate court.[1] Their stipulation of settlement constituted an agreement to accept this settlement and to convert it to a proportionate liability judgment reduction settlement in the event of a successful appeal. The terms of petitioners' stipulated settlement demonstrate the falsity of petitioners' assertion that "for example, in the case below, if the Ninth Circuit's rule had been known from the outset, plaintiffs would not have

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[1]The appellate court did not fashion a rule of law which allows non-settling defendants to receive the *greater* of (1) a judgment credit (i.e., \$925,000,000) *or* (2) a judgment reduction (i.e., percentage of fault reduction); rather than the appellate court held that the non-settling defendants were entitled to a judgment reduction *instead of* a judgment credit. However, the court ordered that the matter be remanded "to the district court so that, subject to the agreement of the settling parties, it may refashion its order as we have instructed." (Appendix A, p.23a)

settled with Kaypro and its eight officers and directors, forcing a jury trial of all eleven defendants upon an already busy district court." (Petition, p. 22, first full paragraph.)

The appellate court's opinion therefore establishes as a rule of offset the contractual alternative agreed to in the stipulation of settlement. This relief is precisely the relief requested by Prudential-Bache (assuming its challenge to the good faith nature of the settlement was rejected). (See Prudential-Bache Opening Brief, 30:19-35:16; Prudential-Bache Reply Brief, 8:17-12:4.) Petitioners' assertion that the amount of the offset to which Prudential-Bache would be entitled at trial was "hardly addressed by the briefs" is flatly wrong.

The appellate court's opinion affirms the good faith bar, by assuring settling defendants that they have "bought their peace." That finding is constant in both the district court and appellate court's opinions. The appellate court's opinion further provides that, following a settlement, non-settling parties such as Prudential-Bache will be entitled to a credit based upon the settling defendants' proportionate liability, rather than an arbitrary amount paid in settlement.

The approach adopted by the appellate court encourages responsible settlement while accommodating the goals of the federal securities laws, including fostering appropriate damage recoveries, deterring wrongful conduct and allocating liability in accordance with relative culpability. Accordingly, for the reasons set forth below, the petition for *certiorari* should be denied in its entirety.

III.

SUMMARY OF ARGUMENT

The arguments set forth below can be summarized as follows:

(1) The appellate court's holding should not be disturbed for the following reasons:

(a) The proportionate liability judgment reduction rule adopted by the appellate court will encourage global and responsible partial settlements;

(b) The appellate court's holding recognizes that elimination of non-settling defendants' rights to contribution and indemnification against settling-defendants is appropriate only if the potential for joint and several liability is modified by proportionate liability judgment reduction; and

(c) The appellate court's holding appropriately seeks to accommodate all of the competing concerns of the federal securities laws.

(2) Insofar as the petition seeks *certiorari* to review the question of implied liability under the 1934 Act, it should be denied on the following grounds:

(a) Petitioners failed to raise the issue before the trial court, and are therefore precluded from raising the issue at this point;

(b) An implied right to contribution under the 1934 Act is necessary to protect the statutory contribution scheme under the 1933 Act and the policies of the federal securities laws in general; and

(c) An implied right to contribution under section 10(b) is a necessary corollary to a finding of joint and several liability under the 1934 Act.

(3) Judgment reduction credit is required under the 1934 Act for reasons identical to those set forth above relating to the 1933 Act.

IV.

ARGUMENT

A. The Appellate Court's Judgment Credit Formulation Should Not Be Disturbed.

(1) The Judgment Reduction Rule Established by the Appellate Court Is the Only Rule Which Will Encourage Global and Responsible Partial Settlements.

The appellate court's holding balances the various competing policy concerns under the federal securities laws and will encourage responsible and equitable settlements. Petitioners, emphasizing only the goal of full recovery, argue that the holding will discourage settlement because plaintiffs may have to bear the risk of an inadequate settlement under certain circumstances. This is simply unfounded.

Settlements are favored because they represent economical and efficient resolutions of disputes. Global settlements of all claims by and against all parties to a litigation are desirable because they represent complete resolutions of disputes. Global settlements will be discouraged by rules of liability allocation that enable certain defendants (either with or without collusion with the plaintiff) to avoid their fair share of responsibility or to shift that responsibility unfairly on to others.

Under the appellate court's holding, global settlements will be encouraged. Plaintiffs will be reluctant to settle with primarily culpable defendants for inappropriately low amounts because such settlements will adversely affect their potential total recovery. Culpable defendants will be less inclined to hold out for trial when it is clear that they cannot use less culpable defendants' settlements as shields. Plaintiffs and less culpable defendants will be encouraged to settle with one another on appropriate terms because such defendants will be able to obtain peace at a fair price, and plaintiffs will not be concerned that by settling they are prejudicing their recovery against more culpable defendants.

In view of the relative risks and advantages to all parties, a global settlement fairly allocating the parties' assessment of comparative fault will be the logical outcome in most instances under the appellate court's approach.

Where a global settlement does not result, partial settlements will be based more appropriately on the relative culpability of each party. A plaintiff will be less inclined to work out a "sweet heart" deal with the principal malefactor in order to be able to proceed against less culpable but perhaps "deeper pocketed" defendants. A culpable defendant which holds out through trial will be assessed damages based on its relative responsibility rather than on the happenstance of who settled prior to trial and for how much.

The instant case, itself, is evidence that the proportionate liability approach does not discourage settlements. Petitioners settled with Kaypro and its officers and directors recognizing that any recovery against non-settling defendants could be limited by principles of relative fault.

Thus, to the extent the holding below affects partial settlements, the opinion encourages responsible settlements. Where a plaintiff chooses unilaterally to engage in partial settlements in successive stages, that plaintiff is encouraged to settle wisely, because it is plaintiff who will bear the risk of an unwise settlement. This result is neither improper nor unfair because it is plaintiffs (along with settling defendants) rather than non-settling defendants who choose to settle or not to settle. It is inappropriate to place the risk of an unfairly low settlement upon a non-participating non-settling defendant.[2]

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[2]In this regard, the appellate court's rejection of the Second Circuit's position in *Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. 1989), is certainly not a ground, in and of itself, to grant this petition. The *Singer* court's opinion fails to consider the various competing concerns addressed by the appellate court below, a fact perhaps recognized by this Court in its denial of the petition for *certiorari* in *Singer*. In addition, the *Singer* opinion did not involve the extinguishment of contribution rights, a request for allocation based upon relative fault or even the issue of a settlement bar between defendants in the same action. The *Singer* court was *only* concerned with whether the settlement should be deducted from the judgment or from the amount of the settling defendant's potential liability.

This very concern was ably addressed by the district court of Colorado in a recently decided securities case closely analogous to the facts of this case. *Alvarado Partners, Lt. v. Mehta*, 723 F. Supp. 540 (D. Colo. 1989). In adopting a "proportionate rule" [similar to the holding of the appellate court here] rather than a "*pro tanto*" rule [similar to the judgment credit rule sought by petitioners], the trial court emphasized the control that the settling plaintiff enjoyed over the entire process, noting the following:

> On the other hand, application of the proportionate rule allows the traditional burdens of litigation to remain where they belong — with plaintiff. If plaintiff wants a "war chest" to fund the litigation through settlement with some of the defendants, plaintiff should bear the risk of an inadequate settlement. *In re Sunrise, supra*. Also while under this rule plaintiff bears the risk of an unfair or unwise settlement, plaintiff has an incentive to obtain a shrewd and informed settlement. If settling defendants pay an amount greater than their proportionate fault as later determined at trial, plaintiff benefits because it retains the entire prior settlement. (723 F. Supp. at 553.)

There is even evidence that the judgment credit rule favored by petitioners actually encourages inequitable or "bad settlements." As the court noted in *In re Sunrise Securities Litigation*, 698 F. Supp. 1256 (E.D. Pa. 1988), because the *pro tanto* or judgment credit rule places the risk of a bad settlement on the non-settling defendants, it "provides an incentive for attempts by guiltier defendants to get off cheaply by settling first." 698 F. Supp. at 1259. As the court noted:

> Because their ultimate monetary recovery would be unaffected, plaintiffs have no incentive to insure that a settlement approximates the defendants' share of liability. Indeed, it is arguable that the only settlements the *pro tanto* rule would promote would be bad settlements, i.e., those in which settling defendants pay less than their share of liability. (698 F. Supp. at 1259.)

These policies were recognized by the appellate court below which flatly rejected a judgment credit rule in concluding:

> There are several disadvantages to this scheme. Plaintiffs may be tempted to engage in collusion with certain defendants. By accepting a low partial settlement, plaintiffs would be able to fund further litigation with no diminution of the total amount eventually received. Similarly, plaintiffs could effect low settlements with the defendants who had limited resources, and thereby force wealthier defendants to pay more than if all parties proceeded to trial. *In re Kaypro Corporation Securities Litigation,* Appendix A, pps. 17a-18a.

By emphasizing the goal of full recovery to the exclusion of all other competing considerations under the federal securities laws, petitioners seek to have this Court establish a national rule of law which would cause non-settling defendants such as Prudential-Bache (which, in the first three drafts of this settlement, was to be dismissed without paying as much as one dollar) to be liable to these petitioners for some $15,750,000 at trial, solely by virtue of Prudential-Bache's status as an ongoing business concern (i.e., deep pocket).

(2) The Appellate Court Holding Recognizes That Elimination Of Non-Settling Defendants' Rights To Contribution And Indemnification Against Settling Defendants Is Appropriate Only If The Potential For Joint And Several Liability Is Modified By Proportionate Liability Judgment Reduction.

Petitioners repeatedly argue that the holding below must be reversed because it "undermines joint and several liability" under the federal securities laws. The first clause of section 11(f) of the 1933 Act is referenced repeatedly, followed by the same conclusion, namely, that the appellate court's holding must be reversed because it seeks to undermine a federal statute.

Petitioners' argument overlooks the remainder of the recovery scheme under the 1933 Act as well as the final portion of section 11(f). Section 11(f) expressly provides a right of contribution for any person who is to be jointly and severally liable under that section. Petitioners fail to acknowledge that the settlement bar which is the result of their good faith settlement extinguishes all rights to contribution and equally affects the statutory scheme under section 11(f). The modification of the statutory recovery scheme begins with the good faith bar; the judgment reduction analysis by the appellate court below merely attempts to balance the impact created by that bar.

In the absence of settlement, traditional principles of joint and several liability remain undisturbed. Similarly, as noted previously, following the appellate court's holding, joint and several liability remains as to non-settling defendants. The concept of joint and several liability need only be adjusted where petitioners seek to extinguish contribution rights as a result of the good faith bar.

The underwriting agreement entered into by Kaypro and Prudential-Bache as lead underwriter for the Kaypro common stock offering provided, *inter alia*, that the underwriters were entitled to indemnification and/or contribution from Kaypro with respect to certain liabilities and expenses. The district court's good faith settlement bar abrogated those contractual rights. Section 11(f) of the 1933 Act and common law principles also provided Prudential-Bache with contribution rights against Kaypro and its officers and directors, which the district court's settlement bar order also eliminated.

Contribution is an equitable principle developed to mitigate the harsh result of joint and several liability. Note: *Apportioning Contribution Shares Under the Federal Securities Laws Acts: A Suggested Approach for an Unsettled Area,* 50 Fordham L. Rev. 450, 456 (1981). Where contribution rights are extinguished by the good faith bar, the appellate court's holding acknowledges the need to provide non-settling defendants with certain protection. In that regard, the only limitation that the holding provides is that if plaintiffs choose to enter into a partial settlement, thereby extinguishing non-settling defendants' contribution rights, plaintiffs must incur a portion of the risk traditionally associated with that settlement by giving up part of the advantage of joint and several liability.

Clearly petitioners would prefer to settle with certain defendants and then receive the balance of all potential damages from non-settling defendants, regardless of non-settling defendants' comparative liability. Petitioners have failed to identify a policy, however, under the federal securities laws or otherwise, which supports their position. In adopting a proportionate liability judgment reduction rule, the appellate court holding seeks to balance

the interests of all parties, and to encourage equitable settlements while continuing to observe traditional legal principles of joint and several liability.

The appropriateness of the appellate court's holding can be illustrated by the following hypothetical. Assume total liability in a case of $25 million, settlement by two defendants prior to trial for a total of $10 million with a good faith bar order entered, and a trial between plaintiffs and the two remaining defendants which results in a finding of liability as to both defendants. Under petitioners' theory, the two non-settling defendants would be jointly and severally liable for $15 million ($25 million minus $10 million) irrespective of the relative fault of the defendants. Even if the two settling defendants were each found by the trier of fact to be 40% responsible and the two non-settling defendants were each found to be 10% responsible, either non-settling defendant could still be required to pay $15 million (60% of the damages) with no right to contribution from either of the settling defendants, each of which the trier of fact found to be 40% responsible. Thus, a defendant with comparatively little fault (10%) could be assessed 60% of the damage award solely because the plaintiff chose to settle with the principal wrongdoers for far less than their true responsibility.

By comparison, under the appellate court's holding, the two non-settling defendants would be jointly and severally liable for $5 million (20%) with rights of contribution between the two of them appropriately preserved.

Once plaintiffs choose to settle, their ability to recover the entire judgment is limited to the extent plaintiffs mistakenly assess the settling defendants' liability when entering into a partial settlement. Accordingly, the only limitation which the appellate court's holding places on the exercise of joint and several liability is an equitable

one triggered by plaintiffs' voluntary decision to enter into a partial settlement. Plaintiffs should not be allowed to escape responsibility for their own settlement decisions at non-settling defendants' expense.

(3) The Appellate Court Holding Appropriately Seeks to Accommodate All of the Competing Concerns of the Federal Securities Laws.

The petition focuses upon one goal — full recovery by plaintiffs. To support that goal, the petition relies predominantly upon that portion of section 11(f) which provides for joint and several liability. As this Court is aware, however, there are a number of competing concerns which must be reconciled in addressing the issues raised by a settlement bar order.

The appellate court's holding addressed these various competing concerns. They include not only the goal of maximum recovery emphasized by petitioners, but also (1) the statutory goal of punishing each wrongdoer; (2) the equitable goal of limiting liability to relative culpability (*Smith v. Mulvaney, supra*); (3) the statutory right to contribution; (4) equitable concerns of fairness; and (5) the encouragement of settlement, particularly global and/or responsible partial settlements.

Whereas the appellate court's opinion contains an analysis of these factors, the petition does not. The petition argues that notwithstanding these competing concerns, a plaintiff in complete control of the settlement process should not be required to accept any risk associated with an inadequate partial settlement, even where that plaintiff concedes that the initial partial settlement had the effect of requiring non-settling parties to pay well in excess of their relative culpability as established at trial. Such an approach is neither supported by statute nor existing case

law, and forms an inappropriate basis upon which to modify the opinion of the appellate court below.

B. Insofar As the Petition Seeks Certiorari to Review The Question of Implied Liability Under the 1934 Act, It Should Be Denied.

(1) Petitioners Failed to Raise this Issue Before The Trial Court, and Are Therefore Precluded From Raising it at This Time.

Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 96 S.Ct. 1399, 426 U.S. 231, 47 L.Ed.2d 701, *on remand*, 431 F. Supp. 40, *affirmed*, 562 F.2d 483, *probable jurisdiction noted*, 98 S.Ct. 1230, 434 U.S. 1060, 55 L.Ed.2d 760, *affirmed*, 99 S.Ct. 957, 440 U.S. 125, 59 L.Ed.2d 194 (1976). In *Hoover v. Ronwin*, 466 U.S. 558, 80 L.Ed.2d 590, 104 S.Ct. 1989 (1984), this Court noted that "the failure to raise this issue in a timely manner precludes our consideration."[3]

A similar rule applies in the court of appeals. *U.S. v. Immordino*, 534 F.2d 1378 (10th Cir. 1976). An issue not raised in the district court will not generally be considered by the court of appeals.

In their brief filed with the Ninth Circuit, petitioners conceded that the question of an implied right to contribution under the 1934 Act was not raised before the district court. Specifically, their brief stated:

> The statutory bases for the remaining federal claims asserted in this action do not expressly provide for

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[3]In *Hoover*, Constitutional claims involving the fifth and fourteenth amendments were raised for the first time in Ronwin's response to petitioner's motion for rehearing in the court of appeals.

contribution among joint tortfeasors. [Footnote omitted.] An implied right to contribution, however, is generally recognized. *See Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 n.7 (2d Cir. 1981); *Heizer Corp. v. Ross*, 601 F.2d at 332; *In re Nucorp Energy Securities Litigation*, 661 F. Supp. 1403 (S.D. Cal. 1987); *In re National Student Marketing Litigation*, 517 F. Supp. 1345, 1347-48 (D.D.C. 1981). This court recognized the existence of an implied right of contribution under section 10(b) of the Exchange Act in *Smith v. Mulvaney*, 827 F.2d at 560.[15]

[15]Plaintiffs assume the existence of implied rights of contribution under these statutes, particularly in light of the court's recent holding in *Smith*. *The issue of whether an implied right exists was not presented to or described by the court below.* It should be noted, however, that in holding that an implied right of contribution exists, the *Smith* court did not engage in the analysis relating to when rights may be implied that was required by the Ninth Circuit's *en banc* decision in *In re Washington Public Power System Securities Litigation*, 823 F.2d 1349 (9th Cir. 1987), holding that no private right of action may be implied under section 17(a) of the Securities Act. In that case, the court applied the analysis articulated by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), to determine whether a private remedy is implicit where not expressly provided by statute. *In re Washington Public Power Supply System*, 823 F.2d at 1353. Such an analysis of congressional intent was engaged in neither by the *Smith* court nor by those circuit court decisions upon which *Smith* relied. *See Huddleston v. Herman & MacLean*, 640 F.2d 654, 667-68 (5th Cir. 1981), *aff'd in part and rev'd in part on other grounds*, 459 U.S. 375 (1983); *Heizer*, 601 F.2d at 331-34; *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curium*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971). [Appellees' brief on appeal, p. 24-25. Emphasis added.]

In their petition for rehearing with suggestion for rehearing *en banc* filed with the Ninth Circuit, petitioners

included one paragraph pertaining to the implied right to contribution under section 10(b). (Petition for Rehearing, p. 14, last full paragraph.) With the exception of that paragraph, however, the entire petition for rehearing concerned the credit issue which is raised in the first and third grounds of their present petition.

In light of their failure to raise the issue before the district court and their failure to contest the issue before the Ninth Circuit, petitioners should now be precluded from raising the issue before this Court at this time. Their one paragraph inclusion in their petition for rehearing is an inappropriate method for raising the issue for the first time. *Hoover v. Ronwin, supra.*

(2) An Implied Right to Contribution Under Section 10(b) of the 1934 Act Is Necessary to Protect the Statutory Contribution Scheme Under the 1933 Act and the Policy of Deterrence Underlying the Federal Securities Laws.

As petitioners have noted, the Ninth Circuit, along with various other courts, has specifically held that a right to contribution is implied under section 10(b) of the 1934 Act. *Smith v. Mulvaney*, 827 F.2d 558 (9th Cir. 1987), *Globus v. Law Research Service Inc.*, 442 F.2d 1346 (2d Cir.) *cert. denied*, 404 U.S. 941 (1971). Such a finding is desirable for a variety of reasons.

The policy of deterrence under the federal securities laws is well documented. *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981). One of the principal purposes of the federal securities laws is to deter culpable conduct. Only by implying a right to contribution under section 10(b) of the 1934 Act will the goal of deterrence be properly implemented, especially given the volume of litigation involving section 10(b).

The appropriateness of an implied right of contribution under section 10(b) of the 1934 Act is apparent from the complementary statutory framework under the 1933 Act. The express right to contribution guaranteed by section 11(f) of the 1933 Act could be abrogated if a similar right is not implied under section 10(b) of the 1934 Act. Whereas damages under the 1933 Act are to be equitably prorated under the statutory scheme of contribution, the intent of that statute could be thoroughly frustrated by the imposition of joint and several liability under section 10(b) without the implication of corresponding rights to contribution.

Such a result could not have been intended by Congress in enacting the 1934 Act. In cases such as this, where claims under both the 1933 and 1934 Acts are concurrently filed, the need for a correlative right to contribution under the 1934 Act is paramount, at least if joint and several liability under section 10(b) is assumed.

Such a conclusion is not affected by petitioners' citation to this Court's opinions in *Texas Industries v. Radcliffe Materials Inc.,* 451 U.S. 630 (1981) and/or *Northwest Airlines Inc. v. Transport Workers Union,* 451 U.S. 77 (1981), or other cases. Neither the Title VII legislation in the *Northwest Airlines* decision nor the Sherman and Clayton Acts in *Texas Industries* involve the same emphasis upon deterrence as is prevalent throughout the decisions interpreting the federal securities laws. This Court, in acknowledging that a number of federal courts have recognized an implied right to contribution under the federal securities laws in both *Northwest Airlines* and *Texas Industries*, chose not to overrule or distinguish those prior decisions, despite the opportunity to do so in both cases. (*See, Northwest Airlines v. Transport Workers*

Union, 451 U.S. at 91, fn. 24; *Texas Industries v. Radcliffe Materials Inc., supra*, 451 U.S. at 639, fn. 11.)

(3) An Implied Right to Contribution Under Section 10(b) Is a Necessary Corollary to a Finding of Joint and Several Liability Under the 1934 Act.

In their introduction to the statement of the case, petitioners assert, without further justification or citation, that liability under the "federal securities laws" (presumably including all sections of the 1934 Act) is joint and several, citing section 20 of the 1934 Act, 15 U.S.C. § 78(t)(a). While section 20 of the 1934 Act provides for control person liability in certain contexts, the application of joint and several liability under the 1934 Act in general or section 10(b) in particular has not been fully resolved.

The concepts of joint and several liability on the one hand and contribution on the other hand are correlative; if one is lacking, the other should be unavailable. To view these interrelated doctrines otherwise is conceptually inconsistent.

Thus, to the extent that a right of contribution, such as that recognized by the Ninth Circuit in *Smith v. Mulvaney, supra*, is implied under section 10(b), then liability under section 10(b) may be joint and several as well. Conversely, if contribution is unavailable (as urged by petitioners) then joint and several liability should be unavailable as well. It is the finding of joint and several liability which creates the need for contribution.

C. Judgment Reduction Is Proper Under Cases Brought Under the 1934 Act As Well.

The petition nominally presents three questions for review. The first challenges the appellate court's finding

of proportionate liability judgment reduction and by its terms is limited to section 11 of the 1933 Act. The second challenges the implied right to contribution under section 10(b). The remaining question simply analyzes the appellate court opinion with respect to its impact on claims under section 12(2) of the 1933 Act and section 10(b) of the 1934 Act.[4]

For all the reasons previously stated, the appellate court's holding should extend to all of petitioners' claims. All of the arguments described above apply with equal force to claims under the 1934 Act.

[4]The appellate court's holding that a non-settling defendant is entitled to proportionate liability judgment reduction clearly extends to all of petitioners' federal securities claims. Although petitioners frequently assert that the appellate court's analysis was limited to the Section 11 claim, there is absolutely no language within the appellate opinion suggesting a different approach with regard to petitioners' other federal securities claims.

IV.

CONCLUSION

For all the reasons stated herein, the petition should be denied in its entirety.

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Respectfully submitted,

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